

(23,669)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 164.

PEGGIE WOODWARD, RICHARD WOODWARD, VIOLA
WOODWARD, ET AL., PLAINTIFFS IN ERROR,

vs.

ROBERT P. DE GRAFFENRIED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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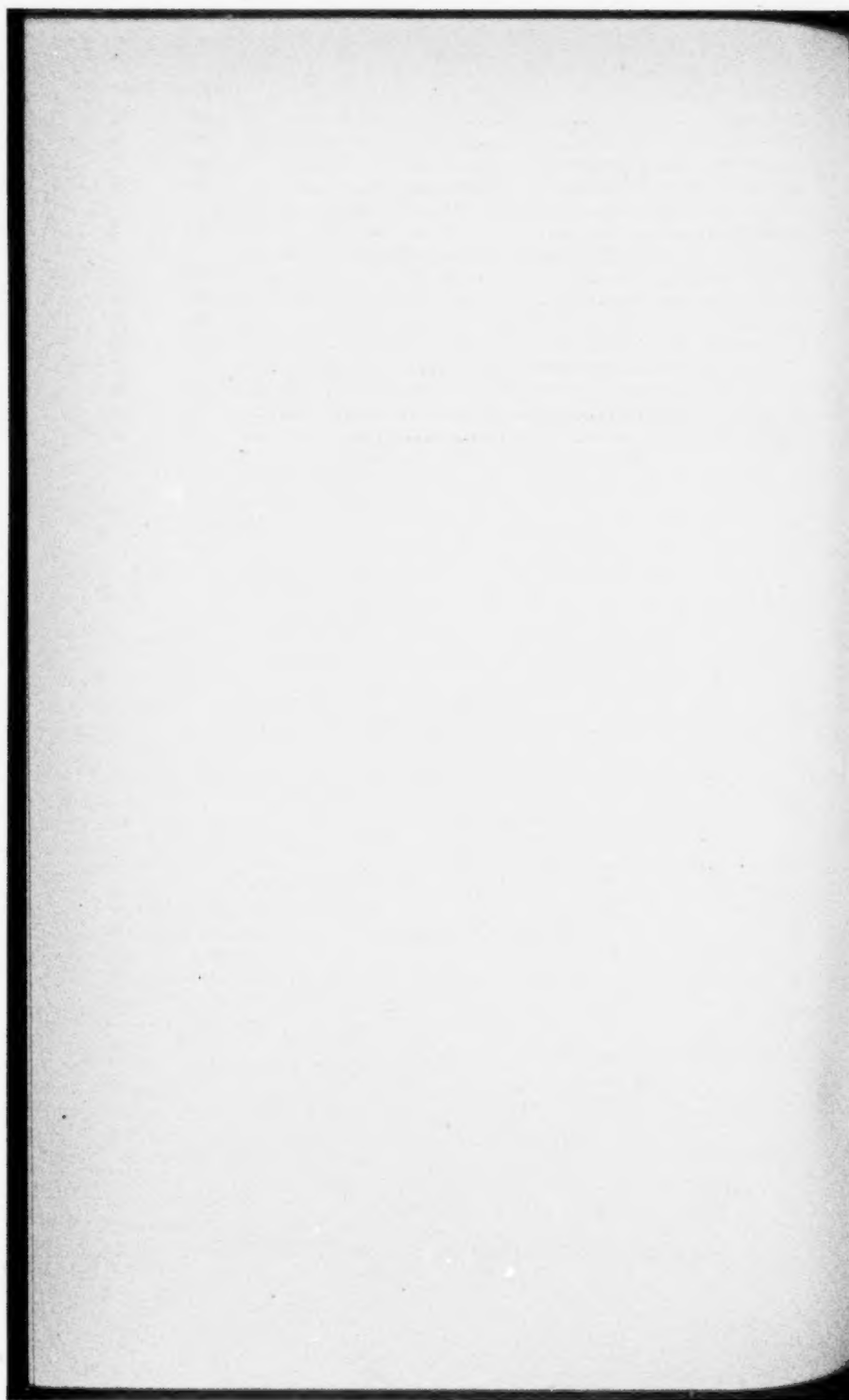
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Return to Writ.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court of Oklahoma, at Oklahoma City, Oklahoma, this 19th day of April, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

1

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to Robert P. de Graffenried,
Greeting:

You are hereby cited and admonished to be, and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Oklahoma, wherein Peggie Woodward, Richard Woodward, Viola Woodward, Annie Sanders, and Jessie Gaines, by Richard Woodward, her legal Guardian, — designated as plaintiffs in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma this 24th day of March, A. D. 1913.

SAMUEL W. HAYES,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

STATE OF OKLAHOMA,
County of —:

I, the undersigned attorney of record for the defendants in error of the above entitled cause, hereby acknowledge the service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

Dated this 31 day of March, 1913.

CHARLES A. COOK,
Attorney for Defendant in Error.

[Endorsed:] Woodward et al., Pl'ffs in error, v. de Graffenried, def't in error. Citation.

2 [Endorsed:] Peggie Woodward et al., Plaintiffs in error, v. Robert P. de Graffenried, Defendant in error. Citation. Filed Apr. 1, 1913. W. H. L. Campbell, Clerk. William R. Lawrence, Att'y for Pl'ff in error Peggie Woodward, Muskogee, Oklahoma. William M. Cravens, Att'y for other plaintiffs in error, Ft. Smith, Arkansas.

3 In the Supreme Court of the State of Oklahoma.

No. 1814.

PEGGIE WOODWARD, RICHARD WOODWARD, ANNIE SANDERS, VIOLA Woodward, Jessie Gaines, Minor, by Richard Woodward, Her Legal Guardian, Plaintiffs in Error,

vs.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Petition in Error.

Said plaintiffs in error respectfully represent that on the 11th day of February, 1913, judgment was rendered against them in favor of said defendant in error, by this honorable court in the above named Court which is final.

Plaintiffs say they are aggrieved in that — the judgment and proceedings prior thereto, in this case, certain errors were committed to their prejudice.

This action was brought by said defendant in error against said Peggie Woodward, plaintiff in error, and one Lewis Woodward, her husband, to recover a judgment against them for the joint possession, as a tenant in common in fee of an undivided one half of an 160 acre tract of land in Muskogee County, said State. The said tract of land having been allotted to one Agnes Hawes, formerly Agnes Woodward, daughter of said Peggie and Lewis Woodward, as her share of the public lands of the Creek Nation of Indians, by reason of her enrollment as a citizen of said tribe, and under an Act of Congress approved June 28, 1898, providing for such allotment, and, as well by virtue of a subsequent act of Congress approved March 1, 1901, agreed to between said tribe of Indians

and the United States, and ratified by the National Council of said Nation, May 25, 1901. The said Agnes Hawes having died
4 in June, 1900, intestate, leaving her surviving, said Peggie Woodward, her mother, who was a duly enrolled citizen and member of said tribe of Indians, and Lewis Woodward, her father, but not a citizen of said tribe, and her husband, Ratus Hawes, also a non-citizen of said tribe, but left no child, children or descendants of child or children. And said defendant, claiming title and right of possession under and by virtue of a deed of warranty to an undivided half of said tract of land from said Ratus Hawes, of date June 22, 1904. And by this action there was drawn in question the construction of certain of said statutes, which construction involved the merits of said action and the right of possession and of title to an undivided one half of said tract of land; and the decision and judgment of this Court is against the title and right of said plaintiff in error, Peggie Woodward, and her co-plaintiffs, contrary to the statutes aforesaid relating to the allotment and final disposition of the lands of said Creek Tribe of Indians, and contrary to the right and title of these plaintiffs in error, all of which will more fully appear from the assignment of errors filed herein.

And also, for further error to the prejudice of these plaintiffs in error, by the judgment of said Court in said cause in this, that, the then defendants in said action entered a special and affirmative defense, by answer, alleging that the then said plaintiff was barred from the prosecution of his supposed cause of action because he had theretofore, July 2, 1904, begun an action in the United States Court for the Western District of the Indian Territory, against the same defendants, for possession and partition of the same land as is involved in this action, and in his complaint therein set forth fully and specifically all the facts alleged, proved and relied upon for recovery in this case, under and by virtue of an Act of Congress approved May 2, 1890, which adopted and extended the procedure of the State of Arkansas over the said territory, and gave
5 thereby full force and effect to said procedure, and that the merits of said cause in said United States Court were heard and determined by said Court and judgment thereupon rendered in favor of said defendants therein and against this defendant in error, whereby the said supposed cause of action thereby became and was forever barred, and was a judgment under and by virtue of said Act of Congress, extending said Arkansas act of civil procedure over said territory, and the construction and force and effect of said act of Congress was involved and was controlling in determining the rights and titles of these plaintiffs in error in this action, and said decision and judgment of this Court is against such claim of right and title by virtue of said Act of Congress approved May 2, 1900, and contrary to said statute of the United States relating to the procedure thereunder in partition and for the possession of lands in said Indian Territory, when the judgment of said Court was rendered, and against the right and title of said plaintiffs in error, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore said plaintiffs in error, pray that a writ of error may issue to the Supreme Court of the State of Oklahoma for correcting the errors complained of, and that a duly authenticated transcript of the record of said proceedings, record and papers may herein be sent to the United States Supreme Court.

PEGGIE WOODWARD,
Pl'ff in Error,
 By WILLIAM R. LAWRENCE,
Her Att'y.
 RICHARD WOODWARD,
 VIOLA WOODWARD,
 ANNIE SANDERS,
 JESSIE GAINES, *Minor,*
 By RICHARD WOODWARD,
Her Legal Guardian,
 By WM. M. CRAVENS, *Their Att'y.*

6 [Endorsed:] No. 1814. Peggie Woodward et al., Plaintiffs in Error, vs. Robert P. de Graffenried, Defendant in Error. Petition in Error. Filed Apr. 1, 1913. W. H. L. Campbell, Clerk. William R. Lawrence, Att'y for Peggie Woodward, Pl'ff in Error, Muskogee, Oklahoma. William M. Cravens, Att'y for other pl'ffs in error, Ft. Smith, Arkansas.

7 In the Supreme Court of the United States.

No. —.

PEGGIE WOODWARD, RICHARD WOODWARD, VIOLA WOODWARD, Annie Sanders, and Jessie Gaines, Minor, by Richard Woodward, Her Legal Guardian, Plaintiffs in Error,

VS.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Assignment of Error on Writ of Error to Supreme Court of Oklahoma.

The plaintiffs in error in the above named cause aver and show that in the judgment and proceedings of said cause, the Supreme Court of the State of Oklahoma erred to the grievous injury and wrong of said plaintiffs in error, in the following particulars, to-wit:

(1) In holding and adjudging that under the evidence, agreed statement of facts, pleadings and laws of the United States relating to the allotment and disposition of the lands of the Muskogee, or Creek Tribe of Indians, and the descent and disposition of such lands after the death of an allottee of such lands, intestate, and without children or descendants of children surviving, and whose nearest relation of Creek citizenship being her mother, the said plaintiff, Peggie Woodward, and whose husband surviving, was a non-citizen

of said Creek Nation; that said defendant in error had established title in fee simple to an undivided half of 160 acres of land, the subject matter of this action, under a deed of conveyance from the surviving husband of said allottee, who is a non-citizen of said tribe of Indians, and the right thereunder to a joint possession as tenant in common with said Peggie Woodward of said land, contrary to an Act of Congress approved March 1, 1901, entitled "an act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians, and for other purposes", whereby said plaintiff in error,

8 Peggie Woodward, was deprived of the title and right of possession, to an undivided one-half of said land, as she should have had and did have under said laws of the United States.

(2) The Supreme Court of Oklahoma erred in holding that the said plaintiff in error, Peggie Woodward, as a citizen of said Creek Nation of Indians, and nearest of kin of Creek blood, and citizenship to said allottee, as shown by the agreed statement of facts in said case, and the Creek law of descent, adopted by said last named Act of Congress, namely, the Act of March 1, 1901, entitled "an act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians and for other purposes", whereby said Peggie Woodward was deprived of her title and right of possession to an undivided one half of said tract of land, as heir at law of the said allottee, under said Creek law of descent and distribution as adopted by said act of Congress, which judgment and holding was contrary to the laws of the United States, aforesaid.

(3) The Supreme Court of the State of Oklahoma, erred in holding and adjudging in this cause, under the agreed statement of facts, evidence, and laws of the United States, and especially under said act of Congress, Approved March 1, 1901, entitled "an act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians and for other purposes", notwithstanding the conceded facts that the land in controversy in this action was formerly a part of the public domain of the Creek Nation of Indians, and by the enrollment of Agnes Hawes, formerly Agnes Woodward, as a citizen of said Nation, she became and was entitled to have a receive an allotment of 160 acres of land out of said public domain, as she might select or have selected, as provided by an act of Congress adopted June 28, 1898, and that thereunder she did select

9 as and for her allotment the said 160 acres of land, the sole subject matter of this action, prior to her death, which was on the 29th day of June, 1900, and that afterward a patent therefor was issued to the heirs of said allottee, without other description, April 1, 1904; that said allottee died intestate, without child or children, or descendants thereof, leaving a husband, Ratus Hawes, and her mother, said Peggie Woodward, plaintiff in error, an enrolled citizen of said Creek Nation of Indians, and her nearest relation of Creek citizenship, and her father, Lewis Woodward, a non-citizen of said Nation of Indians, now deceased, and the other co-plaintiffs in error as her nearest of kin; and notwithstanding the law of descent of the Creek Nation, as shown by the record in this

case, and as interpreted and construed by the Act of Congress of June 30, 1902, entitled "an act to ratify and confirm a supplemental agreement of the Creek Tribe of Indians and for other purposes," providing for the descent of the lands of the Creek Nation and the tribal funds thereof should descend in the line of the Creek blood and Creek citizenship, the said Supreme Court of the State of Oklahoma adjudged that one half of said allotment of said Agnes Hawes descended to said Ratus Hawes, non-citizen husband of said deceased allottee, and the other half to her mother, Peggie Woodward, plaintiff in error, the said defendant in error, Robert P. de Graffenried, being the grantee of said Ratus Hawes under a deed of warranty of June 22, 1904, wherefore, this plaintiff in error, Peggie Woodward, contrary to the facts and the law and especially the said Acts of Congress and laws of descent of said Creek Nation of Indians adopted by said Act of Congress of March 1, 1901, became and was deprived of an undivided one half of said tract of 160 acres.

(4) The said Supreme Court of Oklahoma erred in holding and adjudging that so much of the answer of said plaintiff in error, Peggie Woodward, as affirmatively alleged a defense to the said action of defendant in error was not a defense thereto though alleged that the same had been forever barred by a former recovery in an action brought by said defendant in error (then plaintiff) against this plaintiff in error (then defendant) and her co-defendant
 10 and husband, Lewis Woodward, since deceased, and also a co-defendant in this action, which has been revived in favor of his heirs, the other co-plaintiffs in error herein, as appears from the records of this cause, although she says therein, June 2, 1904, this defendant in error brought his action in the United States Court for the Western District of Indian Territory, against said Peggie Woodward and her husband, Lewis, and after his death revived in favor of his heirs, as aforesaid, for the partition of the said land, and none other, between him and said defendants therein, alleging and claiming to be a tenant in common in fee and entitled to joint possession with them of an undivided one-half of the same, under and by virtue of a warranty deed of conveyance executed to him therefor by one Ratus Hawes, husband of the allottee, Agnes Hawes, a citizen of the Creek Tribe of Indians, who died intestate leaving no child, children or descendants thereof, and her father, said Lewis Woodward, and her mother, said Peggie Woodward; and that the wife of said grantor had selected and received her said allotment but died intestate June 29, 1900, before receiving her patent therefor, which was afterward, April 4, 1904, executed to her heirs, without other description: and further therein alleged as ground for title in said grantor, Ratus Hawes, that said Act of Congress of March 1, 1901, provided that the allotments of deceased citizens of said Nation should descend according to the law of descent of the Creek Nation, and which was set forth in said complaint as follows:

"The lawful or acknowledged wife of a deceased husband shall be entitled to one half of his estate if there are no children, and a child's part if there should be children, in all cases where there is

no will. The husband surviving shall inherit in like manner." It was further alleged in said complaint that the defendants do deny

11 his title, refuse to partition, are now in actual possession receiving rents and profits, and deny him the same or any part thereof, and pray for judgment of partition. Demurrer sustained, plaintiff stood by his complaint and judgment of the Court: "Complaint be and is dismissed for want of equity", September 3, 1906, and so remains the record of said United States Court, and so proved to the trial Court, and so appeared in its record in the Supreme Court of Oklahoma, that the same was not a bar or sufficient defense to this defendant's cause of action, and judgment was rendered accordingly in favor of defendant in error, declaring him the owner in fee as tenant in common with said plaintiff, Peggie Woodward, and entitled to have, hold and enjoy with her the joint possession of said 160 acre tract of land.

(5) The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the trial court and remanding the cause to said court directing a judgment for these plaintiffs in error for costs by them expended and incurred therein.

Wherefore, for these and other manifest errors appearing in the record, the said plaintiffs in error pray that said judgment of the said Supreme Court of Oklahoma be reversed, set aside and held for naught, and that a judgment be directed to be entered for these plaintiffs in error for their costs.

PEGGIE WOODWARD,

Plaintiff in Error,

By WILLIAM R. LAWRENCE,

Her Att'y.

RICHARD WOODWARD,

VIOLA WOODWARD,

ANNIE SANDERS,

JESSIE GAINES, *Minor,*

By RICHARD WOODWARD,

Her Legal Guardian.

THE OTHER PLAINTIFFS IN ERROR,

By WM. M. CRAVENS,

Their Attorney.

12 [Endorsed:] No. 1814. Peggie Woodward, Richard Woodward, Viola Woodward, Annie Sanders, Jessie Gaines, Minor, by Richard Woodward, Her Legal Guardian, Plaintiffs in Error, vs. Robert P. de Graffenried, Defendant in Error. Assignment of Error on Writ of Error to Supreme Court of Oklahoma. Filed Apr. 1, 1913. W. H. L. Campbell, Clerk. William R. Lawrence, Muskogee, Oklahoma, Att'y for Peggie Woodward, Plaintiff in Error. William M. Cravens, Ft. Smith, Arkansas, Att'y for Other Pl'ffs in Error.

13 In the Supreme Court of the State of Oklahoma.

No. 1814.

PEGGIE WOODWARD, RICHARD WOODWARD, VIOLA WOODWARD,
ANNIE SANDERS, and JESSIE GAINES, Plaintiffs in Error,

VS.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Allowance of Writ.

Comes now Peggie Woodward, Richard Woodward, Viola Woodward, Annie Sanders and Jessie Gaines, the plaintiffs in error above named, on this 24th day of March, A. D. 1913, and file and present to this court their petition, praying for the allowance of a writ of error intended to be urged by them; and praying further, that a duly authenticated transcript of the records, proceedings and papers, upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions therein presented,

It is ordered by this Court that a writ of error be allowed, as prayed: Provided, however, that the said Peggie Woodward, Richard Woodward, Viola Woodward, Annie Sanders and Jessie Gaines, by Richard Woodward, her legal guardian, plaintiffs in error, give bond, according to law, in the sum of Five Thousand (\$5,000.00) Dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 24th day of March A. D. 1913.

SAMUEL W. HAYES,
*Chief Justice of the Supreme Court
of the State of Oklahoma.*

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

[Endorsed:] Peggie Woodward et al., Pl'ffs in Error, v. Robert P. de Graffenried, Def't in Error. Allowance of Writ.

14 [Endorsed:] No. 1814. Peggie Woodward et al., Plaintiffs in Error, v. Robert P. de Graffenried, Defendant in Error. Allowance of Writ. Filed Apr. 1, 1913. W. H. L. Campbell, Clerk. William R. Lawrence, Att'y for Peggie Woodward, plaintiff in error, Muskogee, Oklahoma. William M. Cravens, Att'y for other plaintiffs in error, Ft. Smith, Arkansas.

15 *Writ of Error to Supreme Court of State of Oklahoma.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of a plea which is in the said Supreme Court of Oklahoma, before you, or some of you, being the highest court of law and equity in the said state in which a decision could be had in said suit, between Peggie Woodward, Richard Woodward, Viola Woodward, Annie Sanders, and Jessie Gaines, minor, by her legal Guardian, Richard Woodward, defendants and plaintiffs in error, and Robert P. de Graffenried, plaintiff and defendant in error, (1) wherein was drawn in question the validity of a treaty (or statute) of (or an authority exercised under) the United States, and the decision was against their validity, or (2), wherein was drawn in question the validity of a statute of (or an authority exercised under) said State upon the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or (3) wherein was drawn in question the construction of a clause of the constitution of (or of a treaty or statute of, or commission held under) the United States, and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said constitution (treaty, statute or commission) a manifest error hath happened, to the great damage of said plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein
16 given, that then under your seal, distinctly and openly you send the records and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 23d day of April next in the said Supreme Court, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 24th day of March, 1913.

[Seal of the United States District Court, Eastern District of Oklahoma.]

R. P. HARRISON,
*Clerk of the District Court of the United States
for the Eastern District of Oklahoma.*

Allowed this 24th day of March, 1913.

SAMUEL W. HAYEES,
Chief Justice Supreme Court, Oklahoma.

Service of within writ acknowledged and receipt of copy same to me delivered at Muskogee, Oklahoma, this 31st day of March, 1913.

CHARLES A. COOK,
Attorney for Defendant in Error.

17 & 18 [Endorsed:] No. —. Peggie Woodward, Richard Woodward, Viola Woodward, Annie Sanders, Jessie Gains, Minor, by Richard Woodward, Her Guardian, Plaintiffs in Error, vs. Robert P. de Graffenried, Defendant in Error. Writ of Error to Supreme Court, Okla. Filed Apr. 1, 1913. W. H. L. Campbell, Clerk. William R. Lawrence, Muskogee, Okla., Att'y for Peggie Woodward, Pl'ff in Error. William M. Cravens, Ft. Smith, Arkansas, Att'y for other defendants in error.

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Petition in Error.

In the Supreme Court, State of Oklahoma.

No. 1814.

PEGGIE WOODWARD et al., Plaintiff- in Error,
v.
ROBERT P. DE GRAFFENRIED, Defendant in Error.

Plaintiff in error, Peggie Woodward, complains of defendant in error, in this, that at the May Term, 1909, of the District Court of the third Judicial District, Muskogee County, Oklahoma, said defendant in error recovered the judgment of said District Court against said plaintiff in a certain action in which she and her then husband, Lewis Woodward, were defendants and he was plaintiff. A certified copy of the transcript of the record of said action, and being, as well of the original case made and filed in said District Court, is hereto attached and made a part of this petition.

Plaintiff avers that there is manifest error committed by the trial court appearing in said record and case made, in this:

(1) The finding, holding and adjudging that so much of section 28 of an Act of Congress of the United States, entitled "An act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and for other purposes", approved March 1, 1901, as reads: "All citizens who are living on the first day of April, eighteen hundred and ninety nine entitled to be enrolled under section twenty one of an act of Congress, approved June twenty eight, 1806, and all persons who are living on the first day of April, eighteen hundred and ninety eight, entitled 'An act to protect the people of Indian Territory, and for other purposes' shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died, or may here after die before receiving his allotment of lands and distributive

share of the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly"; and that so much of the Creek law of descent and distribution as reads:

"The lawful and acknowledged wife of a deceased husband shall be entitled to one half of the estate, if there are no children, and the child's part if there should be children, in all cases where there is no will. The husband surviving shall inherit of deceased wife in like manner";

Under the evidence and law aforesaid Ratus Hawes, the husband of Agnes Hawes, the allottee of the land in question, though a non citizen of the said Nation, inherited an undivided half of said allotment; and this defendant in error as grantee under warranty deed from said surviving husband became and was the owner in fee of an undivided one-half of the land in question, and entitled to the present possession of same and to have and recover his said moiety as against this plaintiff in error, as tenant in common with her, and his costs, and that he be let into such possession as such tenant in common.

(2) That the trial court further erred in not finding, holding and adjudging that said alleged law of descent of the Creek Nation, contained the implied exception excluding a non-citizen wife and non citizen husband from inheritance thereunder, and by reason thereof barring the said Ratus Hawes, non citizen husband of said Agnes Hawes, allottee of said described land, in controversy, from taking the same or any part thereof, by descent under said law, and therefore holding, finding and adjudging this plaintiff in error was not the owner in fee of said described land and entitled to the present actual possession, and that said defendant in error pay the costs of said suit.

(3) The trial court erred in finding and adjudging that defendant in error was the owner in fee of undivided one half and entitled to the joint possession with plaintiff in error, Peggie Woodward, of the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section 33, Township 15, Range 18, being the homestead of the allottee, as shown by the record herein at page 65 and abstract 27, because the petition of defendant in error, record page 67 and abstract page 27, shows that said 40 acres — part of said allotment and land conveyed by Ratus Hawes to defendant in error, under which supposed conveyance he claims title and right of possession, which appears by the record to have been executed in June 1904, and at said time was restricted from alienation by said act of Congress of March 1, 1901, generally known as the original agreement between the United States and the Creek or Muskogee tribe of Indians, the said restriction being in section 7 of said act and in words and figures following:

"Lands allotted to citizens hereunder shall not in any manner whatever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not

be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement except with the approval of the Secretary of the Interior."

And the plaintiff in error avers that said five years had not elapsed from the ratification of said treaty, which was May 25, 1901, to the time of the execution of said conveyance to defendant in error as aforesaid, wherefore, he has never obtained any title to said 40 acres of land, or the right of possession thereto, and to that extent the judgment below is erroneous.

22 (4) The trial court further erred in refusing to find, hold and adjudge, under the evidence and the law, that defendant's special affirmative defense of former adjudication was a complete bar to the supposed cause of action set forth in this defendant's petition herein, and therefore should have given judgment for costs in favor of plaintiff in error against defendant.

(5) The trial court erred in overruling the motion of this plaintiff in error for the vacation of its said judgment herein and for a new trial.

PEGGIE WOODWARD,

Plaintiff in Error,

By WILLIAM R. LAWRENCE,

Her Att'y.

We hereby join in the above petition in error and adopt the same for and on our behalf, as to the errors assigned in the 4th and 5th paragraphs of said petition in error.

GIBSON & THURMAN,

Attorneys for Viola Woodward, Sammie Woodward, Jessie Gains, Richard Woodward, and Annie Sanders.

Filed June 27, 1910. W. H. L. Campbell, Clerk.

23

Case-Made.

STATE OF OKLAHOMA,
Muskogee County, ss:

In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,

vs.

PEGGIE WOODWARD, ANNIE SANDERS, and SAMMIE WOODWARD, Viola Woodward, and Jessie Gains (the Last Three Named Being Minors), and Richard Woodward, Guardian.

Be it remembered that heretofore, to-wit, on the 25th day of March, 1908, said plaintiff, Robert P. de Graffenried, commenced his action

against said defendants by filing in the District Court of Muskogee County, Oklahoma, his petition, which petition is in words and figures as follows, to-wit:

24 STATE OF OKLAHOMA,
 County of Muskogee, ss:

In the District Court for the Third Judicial District, Sitting at Muskogee.

No. —.

ROBERT P. DE GRAFFENREID, Plaintiff,

vs.

LOUIS WOODWARD and PEGGY WOODWARD, Defendants.

Petition.

The plaintiff, Robert P. de Graffenreid, complaining of the defendants, Louis Woodward and Peggy Woodward, alleges:

1st. That the plaintiff and defendants are residents of the County and State aforesaid, and that the land which is the subject of this action lies within said County of Muskogee.

2nd. That the plaintiff is the owner in fee simple of a one-half undivided interest in and to the following described land situate and being in the County aforesaid, to-wit:

The Southeast Quarter of Section Thirty-three (33)

Township Fifteen (15) North and Range Eighteen (18)

East, the entire tract containing 160 acres.

3rd. That the plaintiff and defendants are tenants in common in and to said land; that the defendants have ousted the plaintiff and refuse to let him have a joint possession with them and deny his right to any interest in said land; that they are in the exclusive, adverse possession thereof, enjoying the fruits, profits and rents enuring therefrom, and appropriating the same to their use.

4th. That they, the said defendants, unlawfully and wrongfully keep plaintiff out of possession of his said land.

25 5th. That by reason of their unlawfully and wrongfully excluding the plaintiff of possession of his said land and keeping him out of the possession thereof, they have greatly damaged him in the sum of \$500.00.

Wherefore, The plaintiff prays judgment that he recover against defendants a joint possession of said lands with the defendants, and that he be declared to be the owner of an undivided one-half interest in said land as tenant in common with the defendants, and that he recover against them Five Hundred (\$500.00) Dollars damages for the unlawful and wrongful detention of said land from the plaintiff and cost of suit.

CHARLES A. COOK,
Attorney for Plaintiff.

STATE OF OKLAHOMA,
County of Muskogee, ss:

Robert P. de Graffenreid, plaintiff in the above named action after having been duly sworn deposes and says: That the statements contained in the foregoing petition are true.

R. P. DE GRAFFENREID.

Subscribed and sworn to before me this March 24, 1908.

My commission expires Jan. 2nd, 1912.

[NOTARY SEAL.]

O. A. CALLISON,
Notary Public.

Said petition is endorsed on back as follows: No. 188 District Court, Rob't P. de Graffenreid, Plaintiff, vs. Louis Woodward, et al., Defendants. State of Oklahoma, County of Muskogee, Filed Mar. 25, 1908. Tont Matney, District Clerk. Cook & de Graffenreid, Attorneys for ———.

26 And thereafter, to-wit, on the 6th day of April, 1908, come the parties herein and file in the District Court for the Third Judicial District, Muskogee County, Oklahoma, an agreed statement of facts herein, said statement of facts being in words and figures as follows:

STATE OF OKLAHOMA,
County of Muskogee:

In the District Court for the Third Judicial District, Sitting at Muskogee, said County and State.

ROBERT P. DE GRAFFENREID, Plaintiff,

VS.

LOUIS WOODWARD and PEGGY WOODWARD, Defendants.

Agreed Statement of Facts.

It is agreed by and between the parties hereto that the above entitled cause shall be submitted to the Court for trial upon the following agreed statement of facts, to-wit:

First. That Agnes Hawes was a citizen of the Creek Nation, enrolled and recognized as such, and that she was not of Indian Blood, being a negro of full blood, and enrolled on the Freedman Roll of the Creek Nation.

Second. That the said Agnes Hawes died in the Creek Nation on the 29th day of June, 1900.

Third. That the said Agnes Hawes before her death made selection of her allotment of land, as such citizen, in the Creek Nation before the Commission to the Five Civilized Tribes, and received a certificate of allotment therefor from the said Commission, which land is described as follows:

27 Being the Southeast Quarter of Section 33, Township 15 North, Range 18 East, in the Creek Nation of the Indian Territory.

Fourth. That after her death, and after the adoption of the Creek Treaty of Agreement between the United States and the Creek Tribe of Indians on the 25th day of May, 1901, the said Commission to the Five Civilized Tribes awarded said land to the heirs of Agnes Hawes, and thereafter on the 1st day of April, 1904, a Patent was duly issued to the heirs of Agnes Hawes, without naming them, which Patent was in due form and duly approved by the Secretary of the Interior, which land awarded to her heirs by said Commission was the same land selected by Agnes Hawes before her death; and for which she had received certificate of allotment.

Fifth. That at the death of the said Agnes Hawes she was the legal and acknowledged wife of Ratus Hawes, the said Ratus Hawes and the said Agnes Hawes having been married under a license issued by the United States Authorities.

Sixth. That the said Agnes Hawes left no children or grand children surviving her and had no children by her said husband Ratus Hawes, and that she left surviving her the defendant Louis Woodward, her father, and the defendant Peggy Woodward, her mother; that she also left surviving her, her husband Ratus Hawes, who is still living.

Seventh. That the said Ratus Hawes is not, and never was a citizen of the Creek Nation.

Eighth. That the said Agnes Hawes came to her death by a gunshot wound inflicted by her said husband, Ratus Hawes, and that the said Ratus Hawes was afterwards tried in the United States Court at Muskogee on the charge of murdering his wife, and was convicted of manslaughter, and served a term in the penitentiary

28 on said charge. That said Ratus Hawes on the 22nd day of June, 1904, executed to plaintiff a warranty deed to an undivided one half interest in and to the above described Quarter Section of land, being the allotment selected by the said Agnes Hawes, deceased, which said deed was duly and regularly acknowledged before a proper officer, and recorded as required by law in the deed records at Muskogee.

Ninth. That the Patent as aforesaid, to the heirs of Agnes Hawes, was accepted by the heirs of Agnes Hawes after the same had been duly recorded by the proper authorities in the proper records.

Tenth. Each and all of the parties hereto reserve the right to offer in evidence before the Court any law of the Creek Nation, whether statutory or decisions of the Creek Courts, relative to descent and distribution of property under the Creek laws applicable to this case.

Dated this April 6, 1908.

CHARLES A. COOK,
Attorney for Plaintiff.
MOMYER & SHARP,
Attorneys for Defendants.

Said statement is endorsed on back as follows: No. 188. District Court. Robert P. De Graffenreid, Plaintiff, vs. Louis Woodward, et al., Defendants. State of Oklahoma, County of Muskogee. Filed Apr. 6, 1908. Tony Matney, District Clerk. Agreed Statement of Facts. Cook & de Graffenreid, Attorneys for ———.

And thereafter, to-wit, on the 24th day of April, 1908, come the defendants, Lewis Woodward and Peggy Woodward, and file in the office of the Clerk of the District Court for the Third Judicial District Muskogee County, Oklahoma, their answer herein, said
29 answer being in words and figures as follows, to-wit:

In the District Court of Muskogee County, State of Oklahoma.

No. 118.

ROBERT P. DE GRAFFENREID, Plaintiff,
vs.
LOUIS WOODWARD and PEGGY WOODWARD, Defendants.

Answer.

The defendants deny that plaintiff at the time of the commencement of this action was the owner in fee simple of the undivided one-half of the real estate described in his petition herein or any part thereof, and that he was entitled to join possession thereof with defendants.

For further answer in this behalf defendants say that plaintiff ought not to have and maintain his action aforesaid, because they say on the 7th day of September, 1906, at and in the United States District Court for the Western District of the Indian Territory, in an action brought in said Court by said plaintiff against these defendants, and none others, wherein plaintiff by his amended complaint therein, alleged and claimed that he was the owner in fee simple of the undivided one half of the same premises now described in his petition herein, and these defendants were the owners in fee and tenants in common with plaintiff in the other undivided one half of said premises; and that defendants were claiming adversely to plaintiff to be the owners in fee simple of the whole of said premises, and the same being wild and unoccupied land, not actually
30 possessed by anyone, the plaintiff therein by his said amended complaint asked that his title and claim aforesaid therein should be adjudged and decreed to be in him, and his title quieted as against the claims aforesaid of these defendants and that the said premises be partitioned according to the several shares of the respective parties, as aforesaid.

Upon said day these defendants filed their demurrer to said amended complaint, and the same was thereupon sustained by the said Court, and this plaintiff then and there elected to stand by his said amended complaint and thereupon the Court ordered, adjudged

and decreed that said amended complaint be dismissed for want of equity, and the same was then and there so dismissed which judgment still remains in full force and effect and unreversed.

LAWRENCE & LAWRENCE,
Attorneys for Defendants.

Said Answer is endorsed on back as follows: 188 De Graffenreid v. Woodward et ux. Answer State of Oklahoma, County of Muskogee. Filed Apr. 24, 1908. Tony Matney, District Clerk. Lawrence & Lawrence, Def't- Att'ys.

And thereafter, to-wit, on the 2nd day of May, 1908, comes the plaintiff, Robert P. De Graffenreid, and files in the office of the Clerk of the District Court for the Third Judicial District, Muskogee County, Oklahoma, his reply to the answer of the defendants heretofore filed herein, said reply being in words and figures as follows, to-wit:

31 STATE OF OKLAHOMA,
County of Muskogee, ss:

In the District Court for the Third Judicial District, Court Sitting at Muskogee.

No. 118.

ROBERT P. DE GRAFFENREID, Plaintiff,
vs.

LOUIS WOODWARD and PEGGY WOODWARD, Defendants.

Reply to Defendants' Answer.

The plaintiff, Robert P. de Graffenreid, hereby affirming and re-alleging all of the matters and things stated by him in his Petition in the above entitled cause, and for reply to the new matter set up in the defendants' answer, alleges:

He admits that he filed in said cause his amended complaint but denies that the said amended complaint stated his cause of action and alleged the facts to be as are stated in the defendants' answer.

He admits that he alleged that the defendants were claiming adversely to the plaintiff to be the owners in fee simple of the whole of the said land, but he denies that he alleged that the said land was wild and unoccupied, and denies that he alleged that it was not actually possessed by any one. And he denies that he asked in said amended complaint that his title and claim therein should be adjudged and decreed to be in him and his title quieted as against the claims of the defendants.

32 But he admits that he asked the Court to partition the lands between him and the defendants, according to their several undivided interest therein, and he admits the defendants filed their demurrer to said amended complaint and that the same

was sustained by the Court and his action was dismissed. But he alleges that the said action was dismissed for want of Equity, for that; It appears upon the face of his said amended complaint that he, the said plaintiff was not in the actual possession of the said land, and that the same was held and occupied adversely to him and the tenancy denied by the defendants. And that the Court dismissed his said action because, under the laws in force at that time, an action for partition could not be intertained and sustained when it appeared that the plaintiff was not in the actual possession of the land, and that the same was held adversely to him.

The plaintiff having fully replied to the new matter set up in the answer of the defendants, insists that the judgement rendered in said action, is not a bar to the plaintiff's cause of action as set forth in his petition.

Wherefore, prays that judgement be rendered in his favor as asked for in his petition.

CHARLES A. COOK,
Attorney for Plaintiff.

STATE OF OKLAHOMA,
County of Muskogee, ss:

I, Robert P. de Graffenreid, plaintiff in above entitled action,
hereby state on oath that the facts stated in the foregoing
33 reply are true.

R. P. DE GRAFFENREID.

Sworn to and subscribed before me this 2nd day of March, 1908.
[NOTARIAL SEAL.] O. A. CALLISON,

Notary Public.

My commission Expires Jan. 2d, 1912.

Said reply is endorsed on back as follows: No. 188 District Court. Robert P. de Graffenreid, Plaintiff vs. Louis Woodard et al., Defendant. Reply to defendants' Answer. State of Oklahoma, County of Muskogee. Filed May 2, 1908. Tony Matney, District Clerk. Cook & de Graffenreid, Attorneys for Plaintiff.

And thereafter, to-wit, on the 27th day of June, 1909, there is filed in the office of the Clerk of the District Court for the Third Judicial District, Muskogee County, Oklahoma, an order from the Supreme Court of the State of Oklahoma, said order being in words and figures as follows:

It being made to appear that the public business requires it, it is hereby directed and ordered that a separate term of the District Court for the 3rd District Court Judicial District of the state of Oklahoma, be held at Muskogee in the County of Muskogee, in said state, commencing with the 6th day of July, A. D. 1908, and continuing for the period of two weeks, Provided, that nothing in this order shall affect or invalidate any proceedings, orders
34 or process heretofore had, made or issued in said court.

And further, the Honorable Malcolm E. Rosser, Judge of

the 5th Judicial Court Judicial District of said state, is hereby assigned, designated and appointed to hold said term of court; and provided further, that it is the intention herein that he shall sit separately with the regularly elected Judge of said District, or any other Judge that may have been properly assigned thereto.

Done in open court at the city of Guthrie on this the 25th day of June, A. D. 1908.

UNITED STATES OF AMERICA,
State of Oklahoma:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of the order of court fixing a separate term of court for the 3rd District Court Judicial District of the State of Oklahoma, at Muskogee, as the same remains of file and record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 25th day of June, 1908.

[COURT SEAL.]

W. H. L. CAMPBELL,
Clerk of Supreme Court,
By W. M. BONNER, *Deputy.*

Said order is endorsed on back as follows: State of Oklahoma County of Muskogee. Filed Jun- 27, 1908. Tony Matney, District Clerk.

35 And thereafter, to-wit, on the 6th day of July, 1908, come the attorneys for the defendants herein, and file in the office of the Clerk of the District Court for the Third Judicial District Muskogee County, Oklahoma, a notice heretofore served on the plaintiff herein, said notice being in words and figures, as follows, to-wit:

In District Court, Muskogee County, Oklahoma.

DE GRAFFENREID

v.

WOODWARD et al.

Notice of Mo. by Def'ts for Leave to File Amended 2nd Special Defense.

To plaintiff:

Take notice that defendants will move the court for an order for leave to file amended 2nd special defense herein, at opening of said Court morning July 6th, 1908, or as soon thereafter as counsel can be heard, copy of which amendment was delivered to you on or about June 20th, 1908.

LAWRENCE & LAWRENCE,
Def'ts' Att'ys.

Acknowledge receipt of copy of above notice July 3rd, 1908, & copy of amended 2nd special defense, about June 20th, 1908.

R. P. DE GRAFFENREID.

Said notice is endorsed on back as follows: 188 De Graffenreid v. Woodward et al. Notice of Mo. for leave to file amended 2nd Special Defense. State of Oklahoma, County of Muskogee, Filed July 6, 1908. Tony Matney, District Clerk. Lawrence & Lawrence. Att'ys for Defendants.

36 And on the same day, Monday, the 6th day of July, 1908, the same being a day of a special term of the District Court for the Third Judicial District, Muskogee County, Oklahoma, Honorable Malcolm E. Rosser, Judge, presiding, comes the defendant herein, by counsel, and files a motion to be allowed to file amended special defense in this action; and the Court having heard said motion, sustains the same and said amended special defense is filed herein. Said amended special defense is in words and figures as follows, to-wit:

In the District Court within and for Muskogee County, State of Oklahoma, June Term, 1908.

No. 188.

DE GRAFFENREID, Plaintiff,

vs.

WOODWARD et al., Defendants.

Amended Second Cause of Defense.

By leave of the Court to amend their second cause of defense, defendants say that plaintiff ought not to maintain his action herein because they say that plaintiff, June 2nd, 1904, filed in the office of the Clerk of the United States District Court for the Western District of Indian Territory, at Muskogee, his complaint in equity, number 5426, duly verified, which stated that June 29, 1900, one Agnes Hawes, a freedman citizen of the Creek Nation enrolled as such, died intestate, and had then made her selection.

37 of allotment of land described as S. E. 1/4 Section 33, Township 15 North Range 18 East, in said Nation; and afterwards patents were issued therefor and delivered to the heirs of said Agnes, but not by other name, April 4, 1904.

Said Agnes left her surviving no child, children or de-cendants thereof, but her only heirs surviving were her husband, Ratus Hawes, a non-citizen of said Nation, and her father and mother these defendants.

Under the treaty between the United States and said Nation of May 1, 1901, provision was made that the land of deceased citizens of said Nation should descend according to the law of descent of said Nation, which was as follows: "The lawful or ac-

knowledgeed wife of a deceased husband shall be entitled to one-half of his estate, if there are no children, and a child's part if there should be children, in all cases where there is no will. The husband surviving shall inherit in like manner."

By virtue of this law said husband became and was seized in fee-simple of an undivided one-half of said described land. June 22, 1904, he executed a warranty deed of an undivided half of said land to plaintiff.

This land is so circumstanced as to be susceptible of division justly and equitably, between plaintiff and defendants, and plaintiff desires such division, and prays for process to compel plaintiff to answer hereto and upon final hearing there be judgement for such partition, and that commissioners be appointed to make said division, and for costs.

Summons was issued thereon and duly served upon said defendants who appeared and filed a demurrer to said complaint alleging as ground therefor that it does not state any cause of
38 action, and that it does not state any ground for equitable relief.

June 9, 1906, the said demurrer was heard and sustained by the Court, and thereupon plaintiff elected to stand by his complaint, and the same was thereupon dismissed by the Court for want of equity.

June 23, 1906, plaintiff filed his motion for an order vacating and setting aside said judgement and decree and alleged as ground therefor, "for the purpose of permitting plaintiff to amend his complaint by alleging the value of the land and other allegations." Therefore said motion was allowed.

June 25, 1906, plaintiff filed his amended complaint wherein he alleged, in substance and effect, that by leave of the Court he amends his original complaint, and in lieu thereof submits a substitute substantially as follows:

June 29, 1900, Agnes Hawes, a Creek enrolled freedman of the Creek Nation, died intestate, and having theretofore made selection of her allotment of land and received certificates therefor, the S. E./4 of Section 33, Township 15 North, Range 18 East, in said Creek Nation. April 1, 1904, a patent for said land was duly issued and delivered to the heirs of said Agnes, copy of which is hereto attached as Exhibit A, and made a part hereof, and the same is of record in the office of the Dawes Commission at said Muskogee.

The said Agnes left no child or children or descendants thereof surviving, but left as her sole heirs her husband, Ratus Hawes, and father and mother, who are defendants, as her sole heirs. By treaty of May 1, 1901, between the said Nation and the United States, it
39 was declared that the land of citizens of the Creek Nation deceased, should descend according to the law of descent of said Creek Nation, and the said law of descent is as follows: "The

lawful and acknowledged wife of a deceased husband shall be entitled to one half of the estate if there are no children and a child's part if there should be children, in all cases where there is no will. The husband surviving shall inherit of deceased wife in like man-

ner." And this law is found in McCellop's Compilation of laws of Creek Nation, and is the only law of inheritance of said Creek Tribe of Indians. By virtue thereof Ratus Hawes is one of the heirs of said Agnes, and entitled to one-half of said land.

June 22, 1904, said Ratus executed to plaintiff his warranty deed to one-half of said land, which is of the value of \$8,000.00; said land is so situated that it can be justly and equitably divided between the plaintiff and defendants, and he desires the same should be done. Defendants deny the title of plaintiff to said land or any part thereof, and have refused and still refuse to divide or partition it and are now in the actual possession of same, enjoying the fruits and revenue thereof, and refuse to recognize the plaintiff's right to any portion of said land or the rents and revenue thereof.

Plaintiff prays for process to compel the defendants to answer hereto, and upon a final hearing a judgment for partition of said land between plaintiff and defendants as their interest and rights may appear and for the appointment of commissioners to make said partition according to the respective rights of said parties as may be determined by the Court.

Verification by the Plaintiff.

Exhibit A is an absolute deed of conveyance "to the heirs of Agnes Hawes," made by P. Porter, Principal Chief of the
40 Creek Nation, for the N./2 of S. E./4 and the S. W./4 of S. E./4 of Section 33, Township 15 North, Range 18 East, in said Nation, duly approved by the Secretary of the Interior April 26, 1904, and signed and acknowledged by said Chief April, 1904, and duly recorded in the office of Dawes Commission.

Exhibit A 2 is identical in for-, date of approval and execution, and matter of record as said Exhibit A, except the land is described as S. E./4 of S. E./4 said section, "selected as homestead for said Agnes Hawes, and said land has been allotted to the heirs of said Agnes Hawes."

Exhibit B is the warranty deed to plaintiff of the undivided one-half of said S. E./4 of Sec. 33, consideration \$1,000.00, made by said Ratus Hawes, June 23, 1904, duly acknowledged and recorded.

July 11, 1906, defendants filed demurrer to said amended complaint and for cause therefor say, 1st, "Complaint does not state facts sufficient to constitute a cause of action, and 2nd, Complaint is not sufficient in law to constitute a cause of action" and ask that same be dismissed and for all other just, equitable and proper relief.

September 7, 1907, the said demurrer was sustained by the Court, and the plaintiff stood by his amended complaint, and thereupon it was adjudged and decreed that said amended complaint be and is dismissed for want of equity, to which action of the Court plaintiff then and there excepted and prayed an appeal which was allowed and supersedeas bond was fixed at \$300.00.

January 7, 1907, plaintiff filed in said Court his supersedeas bond in the sum of \$300.00 which was approved, and his petition
41 for appeal with assignments of errors were allowed by one of the judges of the United States Court of Appeals of the Indian Territory.

At the June Term, 1907, of said United States Court of Appeals, the said appeal was dismissed upon the motion of this plaintiff.

Wherefore, defendants ask for judgment finding the title and rights of possession of said land described herein to be in them and for costs.

LAWRENCE & LAWRENCE,
Defendants' Att'ys.

Said Amended Special Defense is endorsed on back as follows: 188. No. 188. De Graffenreid v. Woodward et al. Amended Special Defense. State of Oklahoma, County of Muskogee. Filed July 6, 1908. Tony Matney, District Clerk. Lawrence & Lawrence, Attorneys at Law, Rooms 308-309 Iowa Building, Muskogee, Okla.

Whereupon, on the same day, the 6th day of July, 1908, comes the plaintiff and files his reply to said special defense heretofore filed herein. Said reply is in words and figures as follows, to-wit:

42 STATE OF OKLAHOMA,
County of Muskogee, ss:

In the District Court in and for the Third Judicial District, Sitting at Muskogee.

No. 188.

R. P. DE GRAFFENREID, Plaintiff,
vs.
WOODWARD et al., Defendants.

Plaintiff's Reply to Defendants' Amended Second Cause of Defense.

The plaintiff, for reply to the amended second cause of defense, filed in the above entitled action, reaffirming all those matters and things alleged in his Petition, says:

He admits the facts stated in said amendment so far as they are stated. But, he alleges that in his cause of action brought in the United States Court for the Western District of the Indian Territory, set up in said amendment, he alleged therein the further fact, to-wit: "That the defendants disregarded and wholly denied the right of the plaintiff in and to said land, and have refused and still refuse to divide or partition said land, and that they are now in actual possession of the same, enjoying the fruits and revenues therefrom, and refuse to recognize the rights of the plaintiff to any portion of said land or to the rents and revenues from same."

That plaintiff is advised and insists that according to the laws in force in the Indian Territory at that time, partition of land could not lawfully be enforced in an action for partition unless plaintiff himself was in possession as a tenant in common with those having an interest therein and from whom a partition is sought.

43 Wherefore, it appearing upon the face of the plaintiff's complaint in said action so instituted in United States Court for the Western District of the Indian Territory, that the defendants were in the actual, adverse, hostile possession, and denying any right or interest of the plaintiff in and to said land, the Court dismissed Plaintiff's action.

And he is further advised and insists that the merits of the case, to-wit: The title to the land in controversy, was not at issue in said action, and that he is not estopped by reason of the judgement pleaded by the defendants in bar of plaintiff's recovery in this action.

Wherefore, he renews his prayer for judgement as set out in his Petition.

CHARLES A. COOK,
Attorney for Plaintiff.

STATE OF OKLAHOMA,
County of Muskogee, ss:

R. P. de Graffenreid, plaintiff in above entitled action, after being duly sworn deposes and says: That he believes the facts stated in the foregoing Reply to be true.

R. P. DE GRAFFENREID.

Sworn to before and subscribed in my presence this the 23 day of June, 1908.

My Com. Ex. Jan. 2d, 1912.

[SEAL.]

O. A. CALLISON,
Notary Public.

Said answer is endorsed on back as follows: No. 188. District Court. R. P. de Graffenreid, Plaintiff, vs. Woodward et al., Defendant. State of Oklahoma, County of Muskogee. Filed July 6, 1908, Tony Matney, District Clerk. Plaintiff's Reply to Defendants' Amended Second Cause of Defense. Cook & de Graffenreid, Attys. for Plaintiff.

44 And thereafter, to-wit, on Thursday, the first day of July, 1909, the same being one of the days of the May, 1909, term of the District Court for the Third Judicial District, Muskogee County, Oklahoma, the Honorable John H. King, Judge, presiding, come the parties by their attorneys, and the defendant, Peggy Woodward, files a motion to make the heirs of Louis Woodward parties defendant in this case. And the Court having heard said motion and being well and sufficiently advised, grants the same, said motion to be reduced to writing and filed by July 2nd, 1909.

And thereafter, to-wit, on Friday, July 2nd, 1909, the same being one of the days of the May 1909, term of the District Court for the Third Judicial District, Muskogee County, Oklahoma, Honorable John H. King, Judge, presiding, comes the defendant, Peggy Woodward, and files her motion to revive this action in the name of the

heirs of Louis Woodard and make said heirs parties defendant, said motion being in words and figures as follows, to-wit:

In the District Court of Muskogee County, State of Oklahoma.

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,
vs.

PEGGIE WOODWARD, LEWIS WOODWARD, Defendants.

*Motion to Revive Action in Names of Heirs of Lewis Woodward,
Defendant, Deceased.*

45 Comes now the defendant, Peggy Woodward, by her Attorney,
and having suggested to the Court the death of her co-
defendant, Lewis Woodward, and moves the Court for an
order reviving said cause against the heirs of said Lewis
Woodward, supported by affidavit giving names of said heirs, hereto
attached.

PEGGIE WOODWARD, *Def't*,
By WILLIAM R. LAWRENCE,
Her Att'y.

STATE OF OKLAHOMA,
Muskogee County, ss:

I, Richard Woodward, being duly sworn according to law, depose and say, that I am the son of Lewis Woodward, who was late defendant in a cause now pending in the District Court of said County and State, being No. 188, and entitled Robert P. De Graffenried against Peggie Woodward and said Lewis Woodward; that said father died in said County and State June 25th, 1909, without leaving any will, and left surviving him his widow, said Peggie Woodward, and myself, his son, and Rose McIntosh and Annie Sanders, his daughters, and his grandchildren, Sammie Woodward and Viola Woodward, minor children of his deceased son, Samuel Woodward, and Jessie Gains, minor child of Jane Gains, a deceased daughter, and I am the legal guardian of said minors. That all of said parties reside in said County and State, and they are the only heirs at law of my said deceased father.

Further saith not.

. RICHARD WOODWARD.

Subscribed and sworn to before me this July 1, 1909.

[NOTARY SEAL.]

FRED C. LAWRENCE,

Notary Public.

My commission Expires January 10, 1910.

46 Said Motion is endorsed on back as follows: 188. De Graffenried v. Woodward et al. Mo. of def't Peggie — to revive
4—164

action in name of heirs of Lewis Woodward, Def't, dec'd. State of Oklahoma, County of Muskogee. Filed July 2, 1909. W. P. Miller, District Clerk. Wm. R. Lawrence, Att'y for Def't.

Whereupon, the plaintiff files a motion to strike said defendant's motion, and the Court takes motion to strike under advisement, said motion to strike being in words and figures as follows, to-wit:

In the District Court for the Third Judicial — of Oklahoma, Sitting at Muskogee, in Muskogee County.

ROBERT P. DE GRAFFENREID, Plaintiff,

vs.

PEGGIE WOODWARD and LOUIS WOODWARD, Def'ts.

The plaintiff moves the Court to strike from the record in this cause the motion by defendant Peggie Woodward to make heirs of Louis Woodward, deceased, parties defendant to this action, for the reason that said motion can be made only by the party adverse to deceased defendant.

2nd. Because the defendant does not seek any affirmative relief from plaintiff.

3rd. Because the heirs of Louis Woodward, dec'd, are not necessary parties to the Controversy between plaintiff and defendant Peggie Woodward.

Respectfully,

CHARLES A. COOK,
Att'y for Plaintiff.

47 Endorsed on back: No. 188. State of Oklahoma, County of Muskogee. Filed Jul. 2, 1909, W. P. Miller, District Clerk.

And on the same day, the second day of July, 1909, there is filed in the office of the Clerk of the District Court for the Third Judicial District, Muskogee County, Oklahoma, an order from the Supreme Court of the state of Oklahoma, said order being in words and figures as follows, to-wit:

In the Supreme Court of the State of Oklahoma.

The term of court heretofore set for Muskogee, in the county of Muskogee, in the *third* district court — judicial district of the state of Oklahoma, to begin on May 24th, 1909, and continue for a period of six weeks, is hereby extended for a further period so as to extend to and include the 31st day of July, 1909.

Filed Jun- 30, 1909.

W. H. L. CAMPBELL, *Clerk.*

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct copy of the order of Court as the same remains on file and of record in this office.

48 In Witness Whereof, I have hereunto set My Hand and affixed the seal of the said Supreme Court, at Guthrie this 30th day of June, 1909.

[Seal Supreme Court.]

W. H. L. CAMPBELL, *Clerk*,
By JESSIE PARDOE, *Deputy*.

Said order is stamped on back: State of Oklahoma, County of Muskogee. Filed July 2, 1909. W. P. Miller, District Clerk.

And thereafter, to-wit, on Tuesday, the 13th day of July, 1909, the same being one of the days of the regular May, 1909, term of the District Court for the Third Judicial District, Muskogee County, Oklahoma, the Honorable John H. King, Judge, presiding, comes the defendants, Richard Woodward and Annie Sanders, and the three minor defendants, by their attorneys, and adopt the answer heretofore filed by the defendants, Peggy Woodward and Louis Woodard. And now, by agreement of parties in open court, the trial of this cause is set for Saturday, July 17th, 1909.

And thereafter, on Saturday, the 17th day of July, 1909, the same being one of the days of the regular May, 1909, term of the District Court for the Third Judicial District, Muskogee County, Oklahoma, the Honorable John H. King, Judge, presiding, the issues having been fully joined, this cause comes on for trial. Both parties announce ready for trial, and both parties having in open court expressly waived trial by jury, said cause is now submitted to the Court. Whereupon the following testimony is introduced:

49 In the District Court for the Third Judicial District, State of Oklahoma, County of Muskogee.

Hon. John H. King, Presiding.

No. 188.

ROBERT P. DE GRAFFENRIED, Plaintiff,
vs.
LOUIS WOODWARD et al., Defendants.

Be it Remembered, That on this 17th day of July, 1909, the same being one of the regular days of the regular July, 1909 Term of said Court, the above entitled and numbered cause coming on for trial, and Messers. Cook & de Graffenried and F. Scruggs, Esq., appearing

on behalf of the plaintiff, and W. R. Lawrence, Esq., and Messers. Gibson & Thurman, appearing on behalf of the defendants, and both sides announcing ready for trial, by agreement of counsel in open court a trial by jury was waived and the cause submitted to the Court.

Mr. Cook made statement of case to the Court on behalf of the plaintiff.

Mr. Lawrence made statement of case to the Court on behalf of the defendants.

Mr. Cook: On behalf of plaintiff we cite Constitution and Laws of the Muskogee Nation as compiled and codified by A. P. McKellop under act of October 15, 1892, found on page 94, being — 267, which reads as follows:

50 “SEC. 267. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no children, and a child's part, if there should be children, in all cases where there is no will. The husband surviving shall inherit of deceased wife in like manner.”

Mr. Cook: Now we offer that as evidence and also ask the Court to take especial cognizance of it as the law.

By the COURT: Is that all Judge Cook.

Mr. Cook: Yes, sir.

Mr. LAWRENCE: I offer in evidence certain portions of the laws of the Creek Nation compiled by L. C. Perryman, March 1, 1890, with this kind of title page, “Constitution and Laws of the Muskogee Nation as compiled by L. C. Perryman, March 1st, 1890. Muskogee, Indian Ter., Phoenix Printing Company, 1890.” I offer so much of that law as pertains to the Constitution of the Creek Nation, being Sections 1, 2, 3, and 9 of Article 1. Article 2, Sections 1, 3, and 4; Article 3, Sections 1, and 2; article 4, sections 1 and 2; article 5, sections 1 and 2; article 6, section 1, article 8, sections 1 and 2; article 10, sections 1 and 2. Now I offer in evidence as contained in this Perryman compilation the following acts of the Creek Council, section 4, on page 23.

“SEC. 4. When any person desires to institute a case the cause of which comes under the jurisdiction of the Supreme Court, he may notify one of the Supreme Judges at any time he may see proper, making known the names of all witnesses and persons party to the cause.”

“SEC. 5. When a case has been instituted into the Supreme Court, the Supreme Judge shall notify the Judge of the District wherein the parties to the suit and witnesses for the same shall reside,
51 giving the names and residences of said parties, and the District Judge shall summon all said parties to attend at the next session of the Supreme Court.”

“SEC. 6. Where witnesses who have been summoned to attend trials at the Supreme Court shall fail to obey such summons, the Supreme Court shall exercise the power of ordering the light horse of the district in which such persons reside to enforce such attendance.”

"SEC. 7. When a suit has been instituted in the Supreme Court, and all parties thereto have been notified twenty days previous to the time of trial, should any of said parties fail to appear at the proper time, the Court shall proceed to consider and decide the case in the same manner as if all parties had appeared, and the decision shall be final, unless the parties who have failed to appear at time of trial, shall, within twenty days of the adjournment of the court, appear before one of the Supreme Judges, and render a sufficient reason for non-attendance in which case there shall be allowed a second trial."

"SEC. 8. The sessions of the Supreme Court shall be conducted in the same manner as the session of the district courts, except where it is otherwise provided by the Constitution and laws."

In force October 12, 1867.

Page 32, Section 5:

"Be it enacted that the will of any citizen of this nation shall be valid; and should any citizen of this Nation die without making a will, not having an opportunity to do so, and shall express before two respectable witnesses the manner of disposition of their effects, it shall be valid. No will shall be valid unless the testator shall have been in his proper mind, to be testified to by two respectable witnesses."

52 "SEC. 6. Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested witnesses; and in all cases where there are no children, the nearest relation shall inherit the property."

Page 34:

"That places which have been vacated without fencing or houses, for the term of five years, shall be liable to settlement and improvement by any citizen of this Nation. Approved October 16, 1872."

Page 35:

Be it further enacted that no citizen of this Nation shall exercise the right of attending any meeting or council called by an alien or aliens, when such meeting is intended to produce lawlessness, or is subversive of the constitution or laws of this Nation; and any citizen found guilty of violating the above law shall receive fifty lashes."

Approved August 1st, 1872.

Now the whole of Chapter 7 of Perryman's Compilation of the laws of the Creek Nation relates to citizens and non-citizens, and I want to introduce the whole of that chapter; that is all except section 1 of article 2 which is the list of persons who have been admitted. Now in article 1, chapter 7, section 1,

"All persons having resided out of the limits of the Muskogee Nation, and whose rights as citizens of the same may seem to be questionable in consequence of intermarriage with non-citizens, shall be bona fide citizens of this Nation, provided they can prove to the

satisfaction of the proper authorities, that they are of Muskogee descent, and not further removed than the fourth degree."

53 "SEC. 2. All persons who have been at any time adopted by the recognized authorities of the Muskogee Nation, and all persons of African descent, who were made citizens by the treaty of June, 1866, between the Creek Nation and the United States, shall hereafter be recognized as citizens of the Muskogee Nation."

"SECTION 3. Any person claiming citizenship under these provisions, shall, in order to establish his or her rights, prove the same by a responsible and disinterested native witness before the District Court."

"ARTICLE III. SECTION 1. All non-citizens not previously adopted, and being married to citizens of this Nation, or having children entitled to citizenship, shall have a right to live in this Nation and enjoy all privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands, and in case of removal from the limits of our Nation shall not have the right to sell their improvements, provided that such person shall satisfy the Principal Chief as to their good character and honest intentions, and provided that the Principal Chief shall grant to such person permit to reside in the Nation during good behavior."

"SEC. 2. The Principal Chief is hereby authorized to grant the permits herein provided for."

Article 4. Rights and disabilities of non-citizens.

"SEC. 1. No non-citizen shall have a right to reside in or to own any kind of property within the Muskogee Nation, except by permit, and any non-citizen, without a permit, who shall make any improvements within the Muskogee Nation, shall forfeit the same to the Nation."

"SEC. 2. This article shall not be construed so as to interfere with persons who are intermarried with citizens of the Muskogee Nation, or so as to interfere with any rights guaranteed by treaty."

54 "ARTICLE V, SECTION 1. All persons who carry on any business transaction within the limits of this Nation, under license from the United States Government, shall be required to pay the sum of one hundred dollars per annum into the National Treasury of this Nation, and it shall be the duty of the Light Horse Captains to collect the same."

"SEC. 2. No non-citizen licensed trader, who has not intermarried with a citizen of this Nation, shall be allowed to enclose more than two acres of our public domain, nor be allowed to cut and put up hay from our common pasturage, and any non-citizen, not intermarried, licensed trader, found cutting and putting up hay from the common pasturage shall be fined ten dollars per acre, for each acre so cut and put up."

"Article VI. Employment of non-citizens. SEC. 1. No citizen of the Muskogee Nation, nor parties residing in the Muskogee Nation by reason of marriage, shall hire, rent or lease any portion of his land or claim to a citizen of the United States, nor shall any permit be issued to a citizen of the United States, as either farm laborer, herder of stock or laborer of any kind."

Article VII that is leasing of land on M. K. & T. Ry. to non-citizens.

Article VIII, that is stock of non-citizens.

"SEC. 1. No person residing within the Muskogee Nation, under permit, shall be allowed to keep within the limits of the Nation any stock, other than such as shall be necessary for immediate use as work stock."

Chapter 8, Article 2, Section 9,

"All live stock which shall stray from any person not a citizen of the Muskogee Nation shall be subject to the Muskogee stray laws."

55 "Chapter 10. SECTION 1. Only citizens shall be appointed administrators of estates of deceased persons."

"SEC. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no other heirs, and an heirs part, if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in a like manner."

"Chapter 12, Article 4, SECTION 3. No citizen holding a claim on the line of any railroad shall have the right to transfer or sell his or her claim to any person not a citizen of this Nation."

"Article 5. Public Blacksmiths. SECTION 4. Each smith shall perform all work pertaining to his business for the citizens of the Muskogee Nation but shall shoe no horse, nor shall he perform any work for any person not a citizen of this Nation during his term of service."

On page 95:

"That after the passage of this act, any non-citizen over the age of fifteen years, desiring to remain within the limits of this Nation, shall appear before the Judge of the District in which he resides, and furnish satisfactory evidence that he is law abiding, and of good character; he shall with at least two surities who shall be responsible citizens of this Nation, enter into bond to the Muskogee Nation in the sum of two hundred and fifty dollars that he will abide by the laws of the Muskogee Nation, and in no manner injure the property of the Nation, or the person or property of any citizen thereof. If there are no legal objections the Treasurer (National) shall issue permit, and charge \$1.00 per month during the time the permit is to run. * * *

56 The person thus procuring permit shall be allowed to keep within the Nation only such live stock as will be actually necessary for the performance of his labor, should he violate his contract he shall forfeit both the permit and the fruits of his labor; and, should he violate his bond suit may be brought against his bondmen. If at the expiration of fifteen days after the permit shall have expired the person obtaining the same procure no new permit, and still remains in the country, he shall be reported for removal by the District Attorney."

Page 96:

"Be it further enacted: That any citizen of this Nation who shall be guilty of renting land to, or otherwise employing, a non-citizen,

except in accordance with this act, shall upon conviction for each offense be fined in the sum of one hundred dollars, said fine to be collected by the District Attorney and placed in the National Treasury." Approved October 18th, 1860.

Page 98, Acts of 1881:

"That, after the passage of this act, no non-citizen who has been legally ordered out of the limits of this Nation shall ever be again permitted to reside within the limits of the Nation, and no officer shall grant a permit to reside within the limits of the Nation to any non-citizen who shall have been ordered out.

* * * * *

That any District Judge who shall intentionally grant a certificate of moral character to a non-citizen who has been legally refused such certificate in another district, or by a preceeding Judge of the same district, shall be subject to impeachment."

Approved October 13th, 1881.

Page 100:

"That movers, not citizens, passing through this Nation, shall pay a tax of ten (10) cents per head on all cattle, horses, mules and asses, which they shall drive through.

57 That no adopted citizen of any other Indian Tribe or Nation, shall have the right to reside within the limits of this Nation unless he is employed by a citizen of this Nation, under the requirements of the permit law."

Approved October 28th, 1881.

Acts of 1882, page 110:

"That after the passage of this bill, no permits to enjoy the rights of citizenship shall be granted to non citizens on account of inter-marriage with citizens of the Muskogee Nation."

Approved October 5th, 1882.

Page 112:

"That no cattle belonging to non citizens shall be permitted to range within the limits of the Muskogee Nation, and any cattle found so ranging shall be taken up by Stock Superintendent and shall be kept in a close herd for the period of thirty days, unless before the expiration of such period the owner of such stock shall appear and properly identify the same.

* * * * *

He shall on the payment of one dollar per head be permitted to take possession of the same and drive them from within the limits of the Nation."

Page 125:

"There is hereby provided an officer of the Muskogee Nation, to be appointed by the Chief, by and with the consent of the Council,

to be styled Inspector General, who shall hold his office for the term of four years, and whose duty it shall be to examine carefully the status of all non citizens sojourning or residing in the limits of the Muskogee Nation, and whenever it shall clearly appear that any such person is not entitled to the privileges of remaining in the Muskogee Nation, according to the meaning of the treaties and Indian intercourse laws of the United States, he shall officially notify such intruder of his decision in his particular case, and demand his removal from the country, granting him only such time within which to leave the limits of the Muskogee Nation as is reasonably necessary to an adjustment of his business affairs."

Page 126:

"That all dwelling houses, barns, stables, or other buildings and fences, metallic or otherwise, built and located on Muskogee soil by any person adjudged an intruder shall be forfeited to the Muskogee Nation.

It shall be unlawful for any citizen of this Nation to enter into any contract, agreement or employment whereby any person who has been ordered out of the Nation by the Inspector General may prevent the purposes of this act, and any citizen so offending shall be fined in the sum of \$250.00. * * *

That the provisions of this act shall be in full force from and after its passage, and acts, or parts of acts inconsistent therewith are hereby repealed."

Approved November 29th, 1883.

Page 129:

"That any citizen who shall be found guilty of claiming or holding stock of whatever nature belonging to non citizens within the limits of this Nation, shall, upon conviction, before any court having jurisdiction be fined for the benefit of the National Treasury in the sum of five dollars for each and every head of stock so claimed or held. * * *

That if any person not a citizen of this Nation be found holding cattle within the limits of this Nation for grazing purposes, it shall be the duty of the Inspector General to report such person to the U. S. Indian Agent, requesting such person to be removed with all such stock immediately from the limits of this Nation."

Approved October 23rd, 1884.

59 Page 132:

"Be it further enacted that any person without complying with these requirements shall be fined \$100.

Any person under said permit shall not be permitted to own houses or fences of any kind within the Nation, or any interest therein, and the citizen permitting the non citizen to own any such property shall be fined \$250."

Approved October 24th, 1884.

Page 135:

"That the principal Chief be and is hereby required to provide a suitable book, in which he shall cause to be recorded the names of all persons who have been or may hereafter be, adopted or adjudged as citizens of the Muskogee Nation, and the same securely keep in the office of the Executive.

* * * * *

That the Principal Chief be and is hereby authorized and required to have all adopted citizens, as mentioned in section first of this act, take the oath of allegiance to the Constitution and laws of the Muskogee Nation, and to renounce all allegiance to any other government."

Approved October 21st, 1886.

Page 148:

"That from and after the passage of this act it shall be unlawful for any non citizen to gather pecans within the limits of this Nation, except for immediate use of his family. All above one bushel shall be confiscated. * * * Provided that this act shall apply to all non citizens within the Muskogee Nation, except such Seminoles as reside in the Creek Nation."

Approved October 18th, 1887.

Page (it is blank here between 140 and 151):

Any number of citizens, not less than three, may associate themselves as a body corporate for the purpose of developing the coal interests of the Muskogee Nation; and for the purpose of obtaining skilled labor and capital they shall have authority to admit to the special privileges of such coal mining corporation, such non citizens or legal association of non citizens as they may elect, either by admitting them as stock-holders, or employing them in the business of mining, transporting or selling of coal."

Page 151:

"It is expressly understood that this act shall not be construed by any person or court so as to confer upon any non citizen the privilege of citizenship, and any non citizen assuming rights and privileges, other than those herein granted shall be subject to the pains and penalties of the law against intruders."

Approved December 3rd, 1887.

McKellop's Compilation, chapter 21:

"SEC. 295. All persons who were born, or who may be hereafter born, beyond the limits of the Indian Territory, and may have heretofore been entitled to make application for citizenship, on account of Indian blood or tribal adoption, and who have continuously resided beyond or outside of the jurisdictional limits of the Muskogee Nation for the period of twenty one years, are hereby declared

aliens, and not entitled to citizenship in the Muskogee Nation, or to any of the privileges thereof."

"SEC. 296. The minor children and descendents of persons so debarred from citizenship and declared aliens, are hereby also excluded from citizenship in the Muskogee Nation, and from all the privileges thereof."

"SEC. 297. All persons who have heretofore applied for citizenship in the Cherokee, Choctaw, Chick-saw or Seminole Nation, and accompanied his application with a declaration of right to citizenship in such Nation, by blood or adoption, is hereby declared
61 an alien, and shall not be entitled to citizenship in the Muskogee Nation, nor to the privileges thereof."

Approved October 26, 1889.

Chapter 22:

"SEC. 299 No non citizen shall on account of marriage with a citizen of this Nation, acquire any right pertaining or belonging to a citizen of this Nation."

"SEC. 300. No non-citizen shall have the right to reside in or to won any improvement in this Nation, except as provided for in the treaties between this Nation and the United States."

Approved October, 1892.

Chapter 14:

"Relates to wills, administration and the descent of property and is the same as that contained in Perryman's compilation except that Sec. 6, p. 32 of that compilation is omitted which provides "that if a person die intestate his property shall be equally divided among his children, and if "there are no children, the nearest relation shall inherit the property" * * *

SEC. 299. No non citizen shall, on account of marriage with a citizen of this Nation, acquire any right pertaining or belonging to a citizen of this Nation."

Then there are another set of resolutions and acts here which I will not insist — anything to show that they were authorized especially. These are:

"Acts and Resolutions of the National Council of the Muskogee Nation of 1893 and 1899, Inclusive. Muskogee, Ind. Ter. Phoenix Printing Company. 1900.

"The acts and resolutions in this volume are merely a reprint as they appeared in pamphlet form in 1893 and 1896, with the acts and resolutions of 1897, '98 and '99 added thereto.

A. P. McKELLOP."

62 The Acts are printed in the order of their passage. There was no attempt made at classification. Quite a number of the Acts and Resolutions are, gram-atically, incomplete and incorrect, but no changes were made in that respect. The sole object in printing the laws has been to embody in convenient form in one volume all the Acts and Resolutions of the Council from 1893 to 1899 in-

clusive. The work has been done by direction of P. Porter, Principal Chief of the Creek Nation.

A. P. McKELLOP."

Acts and Resolutions of 1893, Authorizing the Printing of.

"SECTION 1. The Principal Chief is hereby authorized and directed to appoint some competent person to compile all the laws passed by the present session of Council and have the same translated correctly into Creek and have them printed in one volume in pamphlet form."

"SECTION 3. For the purpose of carrying this act into effect there is hereby appropriated the sum of five hundred dollars (\$500) or so much thereof as shall be necessary; and the Principal Chief shall report to Council the manner of the disbursement of the said amount."

"SEC. 4. The needed corrections pointed out by the special committee appointed to examine the new compilation of the laws shall be included in the compilation and translation herein provided for."

Approved November 6, 1893.

L. C. PERRYMAN,
Principal Chief.

Now that is the act in the beginning of this volume for its printing and publication. And approved by the President, March 20, 1900.

63 Mr. Cook: The plaintiff objects to each and every one of the articles and sections introduced by the defendants from the Perryman Compilation upon the grounds, first that they are incompetent, irrelevant and immaterial. Second, upon the ground that said laws contained in the Perryman edition have been repealed for that the act authorizing the McKellop Compilation and Codification, approved October 15, 1892, previously introduced and submitted by the plaintiff expressly provides

"That the principal Chief be and is hereby authorized and directed to appoint a competent citizen of this Nation to compile and codify all the laws in force up to and including the acts of the session of October, 1892."

Pursuant to which the McKellop Compilation was made.

Mr. Cook: The plaintiff objects to the introduction of the acts and resolutions of the National Council of the Muskogee Nation of 1900 offered by the defendants as evidence upon the ground it does not appear to have been authorized by law, or to have covered all the laws of the Creek Nation.

By the COURT: You simply want these matters to go in subject to objection.

Mr. Cook: Yes sir.

Mr. LAWRENCE: The acts and resolutions of the National Council of the Muskogee Nation of 1893 to 1899 inclusive, I want to intro-

duce, first I have already read the preface, first I want to introduce on page 3, Section 1, which is as follows:

"SECTION 1. The Principal Chief is hereby authorized and directed to appoint some competent person to compile all the laws passed by the present session of Council and have the same translated correctly into Creek and have them printed in one volume pamphlet form."

64 "SEC. 3. For the purpose of carrying this act into effect there is hereby appropriated the sum of five hundred dollars (\$500), or so much thereof as shall be necessary; and the Principal Chief shall report to Council the manner of the disbursement of the said amount."

"SEC. 4. The needed corrections pointed out by the special committee appointed to examine the new compilation of the laws shall be included in the compilation and translation herein provided for."

Approved November 6, 1893.

L. C. PERRYMAN,
Principal Chief.

"SEC. 44. The principal Chief of the Muskogee Nation is hereby authorized and directed to request the United States Indian Agent to prohibit all non-citizens from gathering and selling pecans from off the public domain."

Approved October 25, 1893.

"SEC. 51. There is hereby created a commission to be composed of three competent persons to be elected by the National Council, and to continue in office from their election to the annual session of Council in 1894. They shall visit every non-citizen residing in this Nation and register the names of each member of each family, their race or color, and an inventory of all live stock held or claimed by them."

"SEC. 53. If the Commissioners shall find any non-citizen residing in this country contrary to the treaties, the United States Statutes or the laws of this country, they shall report the same to the Indian Agent and request his removal from the country, and if for any cause the Agent shall fail either to act, or cause his removal within a reasonable time the Commissioners shall then report the matter to the Interior Department and ask his removal."

Approved November 3, 1893.

65 "SEC. 76. The courts of this Nation shall have and exercise jurisdiction over all controversies arising out of or pertaining to property rights acquired in this Nation and by reason of such marriage secured rights and privileges in this Nation under which such property was acquired and accumulated by them."

"SEC. 77. All property brought into this Nation by non-citizens in consequence of intermarriage of such non-citizen with citizens of this Nation shall likewise be under the jurisdiction of the Court of this Nation."

Approved April 6, 1894.

"SEC. 108. No non-citizen shall be permitted to own houses of any kind within the Nation, or any interest therein; and any purchase, grant, lease or other conveyance of lands of the Muskogee Nation, or title or claim thereto given by any citizen or person claiming to be a citizen, contrary to section 2116 of the United States Intercoourse laws is hereby declared to be null, void and of no effect."

Approved October 30, 1894.

"SEC. 152. That a commission to be styled the Citizenship Commission to be composed of five (5) of the most competent citizens of this Nation, be and is hereby created whose duty it shall be to sit as a high court and try, determine and settle all and only such cases as shall involve the question of the right of citizenship of any person in Muskogee Nation that shall be presented to it; either by claimant or the duly authorized representative of the Nation as hereinafter provided.

The members of the Commission shall be elected by the present session of the Council."

"SEC. 153. All persons who shall appear before the Commission in the Muskogee Nation, and all others whose names now appear as citizens on any of the census rolls taken at any time, or on
66 any of the public records of the Nation, the validity of whose citizenship shall in good faith be questioned by any responsible citizen shall be plaintiffs and entitled to the right of counsel and to all other rights usual and incident to the trial of a cause in a court of justice in this Nation."

"SEC. 154. In the examination and adjudication of the claims of negroes to citizenship in the Muskogee Nation the provisions of the treaty of 1866 with the United States shall govern, and the subsequent acts of adoption passed by the National Council shall govern, and cases of claims to citizenship by reason of Indian blood the act of the National Council as appears in sections 295 to 298 inclusive of the Muskogee laws of 1893 shall govern; and when any case shall be decided in favor of any person by the Commission the plaintiff shall ever after be a full citizen and accorded all the rights of any other citizen."

Approved May 30, 1895.

"SEC. 192. All non-citizens residing in the limits of the Muskogee Nation not in accordance with XV Article, treaty of 1856, and permit law of the Muskogee Nation are hereby declared to be intruders, and the Principal Chief be, and is hereby authorized and instructed to use all means by and with the assistance of the United States Indian Agent, to eject all such intruders from within the limits of the Muskogee Nation."

"SEC. 197. The citizenship Commission shall complete its work by September 30, 1896."

Approved August 7, 1896.

"SEC. 200. That the Commission on Citizenship be further continued in office with full authority to act as specially directed in section second of this act and shall so continue until their work is completed."

Approved October 14, 1896.

67 "SEC. 223. From and after the passage of this act no permit shall be issued to any non-citizen to reside within the Muskogee Nation for any purpose whatever except those permitted as hereinafter provided."

"SEC. 224. Any citizen of this Nation who shall permit or allow any non-citizen to work upon his (the citizen's) farm or premises after date of January 1, 1897, shall be guilty of misdemeanor."

"SEC. 225. Any citizen of this Nation who shall employ or work any non-citizen within the Muskogee Nation in any manner and in kind of work whatever after the 1st day of January, 1897, shall be guilty of misdemeanor."

"SEC. 227. The provisions of this Act shall not apply to physicians, surgeons, licensed traders, teachers, preachers and missionaries of any denomination."

Approved November 6, 1896.

"SEC. 254. The Principal Chief be and he is hereby directed to instruct the delegates elected to attend the present extraordinary session of Congress to wait upon the new Secretary of the Interior and urge upon him to issue an order to all intruders in the Muskogee Nation to vacate said Muskogee Nation at once."

Approved March 27, 1897.

MR. LAWRENCE: If the Court please in support of the special bill we offer and introduce in evidence a certified transcript of the records of the United States Court for the Western District of the Indian Territory sitting at Muskogee, being a case in which Robert P. De Graffenried is plaintiff against Louis Woodard and Peggie Woodard, defendants, Equity No. 5426, and contains all that record, all the pleadings and everything, and ask that it be marked

Defendant's Exhibit "A."

68 MR. COOK: No objection.

By the COURT: All right, it will be admitted.

MR. LAWRENCE: We offer in evidence certified copy of a final order of the United States Court of Indian Territory in the case of Robert P. de Graffenried vs. Louis Woodard, et al., as Defendants' Ex. "B."

MR. COOK: No Objection.

MR. LAWRENCE: It is agreed that Louis Woodard was not a citizen of the Creek Nation and was a non-citizen at the time of the death of Agnes Hall.

MR. LAWRENCE. The defendants rest.

MR. COOK: We have nothing to offer Your Honor; we shall move to strike out every part introduced by the defendant that does not bear upon the law of descent in the Creek Nation.

MR. COOK: We reserve the right to specify each part we particular-objest to when the record is made up.

DEFENDANTS' EXHIBIT "A."

In the United States Court, Western District, Indian Territory,
Sitting at Muskogee.

Equity. No. 5476.

ROBERT P. DE GRAFFENREID, Plaintiff,

VS.

LOUIS WOODWARD and PEGGIE WOODWARD, Defendants.

Be it remembered that on the 2nd day of July, 1904, comes Robert P. de Graffenreid, the Plaintiff herein, and files in the office of the Clerk of the United States Court for the Western District of the Indian Territory, at Muskogee, Indian Territory, his Complaint in the above entitled cause.

Said complaint is in words and figures as follows, to-wit:

70 In the United States Court for the Western District, Indian Territory.

ROBERT P. DE GRAFFENREID, Plaintiff,

VS.

LOUIS WOODWARD and PEGGIE WOODWARD, Defendants.

Complaint in Equity.

Robert P. De Graffenreid, plaintiff, herein complaining of Louis Woodward and Peggie Woodward, defendants herein says: that plaintiff and defendants are all residents of the Western District of the Indian Territory, and for cause of action he represents that heretofore, to-wit: on the 29 day of June, 1900, one Agnes Hawes departed this life in the Creek Nation, Indian Territory, and at the time of her death she was a citizen of the Creek Nation, enrolled and recognized as such, and that she was not of Indian blood being a negro of the full blood and enrolled on the Freedman roll of the Creek Nation.

That the said Agnes Hawes before her death made selection of her allotment of land in the Creek Nation before the Commission to the Five Civilized Tribes at Muskogee, Indian Territory, which land is described as follows:

The S. E. $\frac{1}{4}$ of Section 33, Township 15, N. Range 18 East, in Creek Nation, Indian Territory, and that after her death and after the adoption of Treaty or Agreement between the United States and the Creek Tribe of Indians, on the 25th day of May, 1901, the said Commission awarded said land to the heirs of the said Agnes Hawes, and thereafter on the 1st day of April, 1904, a patent to said land was duly issued to the heirs of Agnes Hawes (without naming
71 said heirs) by the Creek Tribe of Indians, by and through P. Porter, its Principal Chief, which patent was approved by

the Honorable Secretary of the Interior. A copy of said patent being hereto attached marked Exhibit A. and made a part hereof. That at the time of her death the said Agnes Hawes who died intestate was the lawful wife of Ratus Hawes, and that she died without issue and left surviving her as her only heirs at law, Ratus Hawes, her husband, and Louis Woodward, her father and Peggie Woodward, her mother. That the said Ratus Hawes is a citizen of the United States and not a citizen of the Creek Nation and is not of Indian blood. Plaintiff further avers that by the terms and provisions of the above described treaty between the United States and the Creek Tribe of Indians, of May 25th, 1901, the lands of deceased citizens of said Creek Nation should descend and be distributed under and according to the laws of descent and distribution of said Creek Tribe of Indians, which law is here specifically pleaded and is — follows:

"The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no children and a child's part, if there should be children, in all cases where there is no will.

The husband surviving shall inherit of deceased wife in like manner."

That under the said Creek law the said Ratus Hawes, husband of the said Agnes Hawes, is one of the heirs at law of said Agnes Hawes and as such is the owner of and entitled to one-half of the above described land allotted as aforesaid, to the heirs of the said Agnes Hawes, deceased.

That as such heir the said Ratus Hawes, did on the 22nd day of June, 1904, execute and deliver to this plaintiff his certain Warranty Deed which deed was duly and legally acknowledged, and duly recorded in the office of the Clerk of the United States

72 Court, for the Western District of the Indian Territory, at Muskogee; whereby he conveyed to plaintiff, in fee simple, an undivided one half interest in and to the above described land. Copy of said deed being hereto attached, marked Exhibit B, and made a part hereof.

Whereby plaintiff says he is the owner in fee simple of an undivided one-half of said land.

Plaintiff represents that the above described lands is of such character that same can be justly and equitably divided between plaintiff and defendants, and that plaintiff is desirous of having same divided and partitioned.

The premises considered, plaintiff prays for process to compel the defendants to answer hereto, and on final hearing he have judgment to partition said land between the plaintiff and the defendants as their rights and interests may appear to the Court, and that Your Honor make an order appointing commissioners, residents of the Western District of the Indian Territory, to partition the above described land according to the rights of plaintiff and defendants as may be determined by this Court; and for all costs of suit.

DE GRAFFENREID & SCRUGGS,
Attorneys for Plaintiff.

I, R. P. De Graffenreid, plaintiff, do solemnly swear that I know the contents of the above complaint and that the allegations therein are true.

R. P. DE GRAFFENREID.

Subscribed and sworn to before me this the 2nd day of July, 1904.

[SEAL.]

J. H. KEE,
Notary Public.

My commission expires March 14, 1907.

Western Dist. Ind. Ter. Filed July 2, 1904. R. P. Harrison,
Clerk U. S. Courts.

73 And on the same day, the 2nd day of July, 1904, there is issued out of the office of the Clerk of the United States Court for the Western District of the Indian Territory, at Muskogee, Indian Territory, a summons herein directed to the Marshal for the Western District, Indian Territory, commanding him to summon the defendants to duly answer herein.

And, afterwards, on the 11th of July, 1904, comes the said Marshal and files in the office of the Clerk of the United States Court for the Western District of the Indian Territory, at Muskogee Indian Territory, the summons heretofore issued herein, with his return endorsed thereon.

Said summons and return are in words and figures as follows, to-wit:

74

No. 5426.

Summons in Equity.

UNITED STATES OF AMERICA,
Indian Territory, ss:

The President of the United States of America to the Marshall for the Western District, Indian Territory:

You are commanded to summon Louis Woodward and Peggie Woodward to answer in twenty days after the service of this Summons upon them a complaint in equity filed against them in the United States Court for the Western District, Indian Territory, at Muskogee by Robert P. de Graffenreid and warn them that upon their failure to answer, the complaint will be taken for confessed and you will make due return of this Summons on the first day of the next October Term of said Court.

Witness, the Honorable C. W. Raymond, Judge of said Court, and the seal thereof, at Muskogee, Indian Territory, this 2nd day of July, A. D. 1904.

[COURT SEAL.]

R. P. HARRISON, *Clerk*,
By CHAS. F. RUNYAN, *Deputy*.

Marshall's Return.

UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

I received this Summons the 2nd day of July, 1904, at 6 o'clock P. M. and served the same by copy as follows:

Personally on Louis Woodward, Muskogee, Ind. Ter. this 5th day of July, 1904, at 11:15 o'clock, A. M.

On Peggie Woodward, Muskogee, Ind. Ter. this 5th day of July, 1904, at 11:15 o'clock A. M.

LEO E. BENNETT,
U. S. Marshall,
By DAVID ADAMS, *Deputy.*

Filed July 11, 1904. R. P. Harrison, Clerk U. S. Courts.

75 And afterwards, on the 26th day of July, 1904, come the defendants in this cause by their attorneys, Soper, Huckleberry & Owen and file in the office of the Clerk of the United States Court for the Western District of the Indian Territory, at Muskogee, Indian Territory, a demurrer to the complaint heretofore filed herein.

Said demurrer is in words and figures as follows, to-wit:

76 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

No. 5426.

ROBERT P. DE GRAFFENREID, Plaintiff,
vs.

LOUIS WOODWARD and PEGGIE WOODWARD, Defendants.

Demurrer.

Now come the said defendants, by Soper, Huckleberry & Rider, their attorneys, and demur to the complaint in equity of said Plaintiff filed herein, and for grounds of demurrer say:

1st. That said complaint does not state any cause of action against these defendants.

2nd. That said complaint in equity does not state any ground for equitable relief on behalf of said Plaintiff against these defendants.

Wherefore, these defendants pray that their demurrer may be sustained and said complaint may be dismissed with costs.

SOPER, HUCKLEBERRY & RIDER,
Attorneys for Defendants.

Western District, Ind. Ter. Filed July 26, 1914. R. P. Harrison, Clerk U. S. Courts.

(6)

77 And afterwards, on Tuesday, the 20th day of May, 1904, the United States Court for the Western District of the Indian Territory, at Muskogee, Indian Territory, met pursuant to adjournment. The Hon. William R. Lawrence, Judge, presiding. Present: The Hon. William R. Lawrence, Judge; R. P. Harrison, Clerk; Leo E. Bennett, U. S. Marshal; Wm. M. Mellette, U. S. Attorney.

Court having been opened in due form of law, the following proceedings were had, to-wit:

Equity. No. 5426.

R. P. DE GRAFFENREID

vs.

PEGGY WOODWARD and LOUIS WOODWARD.

And comes Soper, Huckleberry and Rider and file their motion, on their behalf for leave to withdraw as attorneys for the defendants herein. And the Court being well and sufficiently advised in the premises, doth allow said motion, and the clerk of the court is ordered to notify said defendants of such action on the part of their attorneys. And it is ordered that this cause be set down for hearing Monday, June 4, 1906, at 9:00 A. M.

78 And thereafter, on Saturday, the 9th day of June, 1906, the United States Court for the Western District of the Indian Territory, at Muskogee, Indian Territory, met pursuant to adjournment, the Hon. William R. Lawrence, Judge, presiding. Present: The Hon. William R. Lawrence, Judge; R. P. Harrison, Clerk; Leo E. Bennett, U. S. Marshal; Wm. M. Mellette, U. S. Attorney.

Court having met in due form of law, the following proceedings were had, to-wit:

Equity. 5426.

ROBERT P. DE GRAFFENREID

vs.

LOUIS WOODWARD and PEGGIE WOODWARD.

And on this day comes on to be heard the demurrer of the defendants to the plaintiff's complaint and the Court having heard the argument of counsel and being well and sufficiently advised in the premises, doth sustain said demurrer. To which ruling of the Court plaintiff excepts, and elects to stand upon his complaint. It is therefore ordered, adjudged and decreed that the plaintiff's complaint be, and the same is hereby dismissed for want of Equity. To all of which the plaintiff excepts. It is further considered, ordered and adjudged that the defendants do have and recover of and from the plaintiffs all their costs herein laid out and expended. And for which let execution issue. To which plaintiff excepts and prays for and is granted an appeal herein.

79 And thereafter, on Saturday, the 23rd of June, 1906, the United States Court for the Western District of the Indian Territory at Muskogee, Indian Territory, met pursuant to adjournment, the Hon. William R. Lawrence, Judge, presiding. Present: The Hon. William R. Lawrence, Judge; R. P. Harrison, Clerk; Leo E. Bennett, U. S. Marshal; William M. Mellette, U. S. Attorney. Court having met in due form of law, the following proceedings were had, to-wit:

Equity. 5426.

R. P. DE GRAFFENREID

vs.

LOUIS WOODWARD and PEGGIE WOODWARD.

And on this day comes the plaintiff and files his motion for an order setting aside the decree heretofore entered herein, and for leave to file an amended complaint. And said motion coming on to be heard and the Court having heard the argument of counsel and being well and sufficiently advised in the premises, doth allow said motion.

And it is ordered that the decree herein be and the same is hereby vacated. And the plaintiff is ruled to file his amended complaint herein by Monday morning next.

Said motion to set aside judgment is in words and figures as follows, to-wit:

80 In the United States Court in the Indian Territory, Western District, Sitting at Muskogee.

R. P. DE GRAFFENREID, Plaintiff,

vs.

LEWIS WOODWARD and PEGGIE WOODWARD, Defendants.

Motion to Set Aside Judgement.

Comes now the plaintiff and moves the court to set aside the judgement rendered herein for the purpose of permitting plaintiff to amend his complaint by alleging the value of the land in this suit and other allegations. Wherefore, he prays judgement of the Court.

DE GRAFFENREID & SCRUGGS,

Attorneys for Plaintiff.

Filed In Open Court June 23, 1906. R. P. Harrison, Clerk U. S. Courts.

81 In the United States Court for the Western District of the Indian Territory, at Muskogee.

ROBERT P. DE GRAFFENREID, Plaintiff,

vs.

LOUIS WOODWARD and PEGGIE WOODWARD, Defendants.

Amended Complaint in Equity.

Comes now the plaintiff, Robert P. de Graffenreid, leave of the Court being first had, and amends his original complaint filed herein on the 2nd day of July, 1904, and in lieu thereof submits the following as a substitute.

Plaintiff complaining of the defendants represents that they are all residents of the Western District of the Indian Territory, and for cause of action he states that heretofore, to-wit: on the 29th day of June, 1900, one Agnes Hawes departed this life in the Creek Nation, Indian Territory, and at the time of her death she was a citizen of the Creek Nation, enrolled and recognized as such, and that she was not of Indian blood, being a negro of the full blood, and enrolled on the freedman roll of the Creek Nation. That said Agnes Hawes before her death made selection of her allotment of land in the Creek Nation before the Commission to the Five Civilized Tribes of Muskogee, Indian Territory, and received a certificate therefor from the said Commission, which land is described as follows, to-wit: South-east quarter of Section 33, Township 15 North, Range 18th East, in the Creek Nation of the Indian Territory. That after her death and after the adoption of the treaty or agreement between the United States and the Creek Tribe of Indians, on the 25th day of May, 1901, the said Commission awarded said land to the heirs of Agnes Hawes, and thereafter on the 1st day of

82 April, 1904, a patent to said land was duly issued to the heirs of said Agnes Hawes (without naming said heirs) by the Creek Tribe of Indians, by and through P. Porter, its Principal Chief; which patent was duly approved by the Honorable Secretary of the Interior, a copy of said patent being hereto attached, marked Exhibit A and made a part hereof, that said patent was duly recorded by the said Commission to the Five Civilized Tribes and delivered to the defendants as two of the heirs of the said Agnes Hawes; that the said Agnes Hawes died intestate, and at the time of her death she was the lawful and acknowledged wife of Ratus Hawes; that the said Agnes Hawes died without issue and left surviving her as her only heirs at law Ratus Hawes, her husband, Louis Woodward, defendant, her father, and defendant Peggie Woodward, her mother and that these three named parties were the only heirs at law she left surviving her.

Plaintiff further avers that by the terms and provisions of the above described treaty or agreement between the United States and the Creek Tribe of Indians, dated May 25, 1901, the lands of deceased citizens of said Creek Nation should descend and be dis-

tributed under and according to the laws of descent and distribution of said Creek Tribe of Indians, which law is here specially pleaded and is as follows, to-wit:

"The lawful and acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no children and the child's part if there should be children, in all cases where there is no will. The husband surviving shall inherit of deceased wife in like manner."

Plaintiff says that the above statute, as found in McKellop's compilation of the laws of the Creek Nation, is the only law of inheritance of said Creek Tribe of Indians, and that under the said law the said Ratus Hawes, husband of Agnes Hawes, is one of the heirs at law of the said Agnes Hawes and as such heir is the owner of and entitled to one-half of the above described land allotted as aforesaid to the heirs of the said Agnes Hawes, deceased. That as such heir the said Ratus Hawes did on the 22d day of June, 1904,

83 execute and deliver to this plaintiff his certain warranty deed which deed was duly and regularly acknowledged and duly recorded in the office of the clerk of the United States Court for the Western District of the Indian Territory, at Muskogee, whereby he conveyed to plaintiff in fee simple an undivided one-half interest in and to the above described quarter section of land, copy of said deed being hereto attached, marked Exhibit B and made a part of this complaint. Whereby plaintiff says that he is the owner in fee simple of an undivided one-half of said land.

Plaintiff further states that his interest in said land, which is an undivided one-half as aforesaid, is well and reasonably worth the sum of \$8,000.00.

Plaintiff further represents that said quarter section of land is of such character, being agricultural land, that the same can be justly and equitably divided between the plaintiff and the defendants, and that the plaintiff is desirous of having the same divided in partition.

Plaintiff further avers that the defendants disregard and wholly deny the rights of plaintiff in and to said land and have refused and still refuse to divide or partition said land, and that they are now in the actual possession of same enjoying the fruits and revenue therefrom and refuse to recognize the rights of plaintiff to any portion of said land or to the rents and revenue from same.

The premises considered plaintiff prays for process to compel the defendants to answer hereto and on the final hearing he prays for judgement to partition said land between defendants and the plaintiff as their rights and interests may appear to the Court; and that your Honor make an order appointing a commission, residents of the Western District of the Indian Territory, to partition the above described land according to the rights of plaintiff and the defendants as may be determined by this Court, and for all costs of suit.

DE GRAFFENREID & SCRUGGS,

Attorneys for Plaintiff

84 INDIAN TERRITORY,
Western District, ss:

I, Robert P. de Graffenreid, do solemnly swear that I know the contents of the above complaint, and that the allegations therein are true.

R. P. DE GRAFFENREID.

Subscribed and sworn to before me this 25th day of June, 1906.

[SEAL.]

CHARLES T. DIFENDAER,

Notary Public.

My commission expires January 25, 1910.

85 Creek Freedman Roll No. 4545.

Allotment Deed to Heirs.

The Muskogee (Creek) Nation, Indian Territory, to all to whom these presents shall come, Greeting:

Whereas, by the act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as herein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

Whereas, it was provided by said act of Congress that if a citizen of said tribe has died before receiving his allotment of lands, the lands to which he would be entitled, if living shall descend to his heirs and be allotted and distributed to them; and

Whereas, The Commission to the Five Civilized Tribes has found that Agnes Hawes, a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been allotted to the heirs of the said Agnes Hawes,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said heirs of Agnes Hawes, deceased, all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz: The North Half of the South East Quarter and the South West Quarter of the South East Quarter of Section Thirty-three (33), Township Fifteen (15) North and Range Eighteen (18)

86 East of the Indian base and meridian, in Indian Territory, containing one hundred and twenty (120) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of said act of Congress and to the provisions of the act of Congress approved June 30, 1902 (32 Stat., 500).

In witness whereof, I, the Principal Chief of the Muskogee

(Creek) Nation, have hereunto set my hand and caused the great seal of said nation to be affixed this 1st day of April, A. D. 1904.

[SEAL.]

P. PORTER,

Principal Chief of the Muskogee (Creek) Nation.

L. R. S.

Department of the Interior: Approved Apr. 26, 1904.

ETHAN A. HITCHCOCK, *Secretary,*

By OLIVER A. PHELPS, *Clerk.*

Filed for record on the 4th day of May, 1904, at 10 o'clock A. M.

I, T. B. Needles, one of the Commissioners to the Five Civilized Tribes, hereby certify that the within is a full, true and correct copy of the original allotment deed to the heirs of Agnes Hawes, Creek Freedman Roll No. 4545, as the same appears of record in the office of the Commission, in Record Book 1 page 243.

T. B. NEEDLES,

Commissioner.

Muskogee, Indian Territory, July 2, 1904.

87

Creek Freedman Roll No. 4545.

Homestead Deed to Heirs.

The Muskogee (Creek) Nation, Indian Territory, to all to whom these presents shall come, Creeting:

Whereas, by the act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

Whereas, it was provided by said act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed; and

Whereas, it was provided by the act of Congress, approved June 30, 1902 (32 Stat., 500), that the homestead of each citizen shall descend to his heirs or be disposed of as therein provided, and

Whereas, The Commission to the Five Civilized Tribes has found that Agnes Hawes, a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been selected as a homestead for said Agnes Hawes and that said land has been allotted to the heirs of said Agnes Hawes,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid acts of the Congress of the United States, have granted and conveyed, and by these presents do grant

and convey, unto the heirs of the said Agnes Hawes, deceased,
all right, title, and interest of the Muskogee (Creek) Nation
88 and of all other citizens of said Nation in and to the follow-
ing described land, viz:

The South East Quarter of the South East Quarter of Section
Thirty-three (33) Township Fifteen (15) North and Range Eight-
teen (18) East of the Indian base and meridian, in Indian Territory,
containing Forty (40) acres, more or less, as the case may be,
according to the United States survey thereof, subject however, to
the provisions of said acts of Congress.

In witness whereof, I, the Principal Chief of the Muskogee
(Creek) Nation, have hereunto set my hand and caused the Great
Seal of said nation to be affixed this 1st day of April, A. D. 1904.

[SEAL.]

P. PORTER,

Principal Chief of the Muskogee (Creek) Nation.

L. R. S.

Department of the Interior: Approved Apr. 26, 1904.

ETHAN A. HITCHCOCK, *Secretary,*

By OLIVER A. PHELPS, *Clerk.*

Filed for record on the 4 day of May, 1904, at 10 o'clock A. M.

I, T. B. Needles, one of the Commissioners to the Five Civilized
Tribes hereby certify that the within is a full, true and correct
copy of the original Homestead deed to the heirs of Agnes Hawes,
Creek Freedman Roll No. 4545, as the same appears of record in
the office of the Commission, in Record Book A at page 243.

T. B. NEEDLES,

Commissioner.

Muskogee, Indian Territory, July 2, 1904.

89

General Warranty Deed.

This Indenture, made and entered into this 22nd day of June,
one thousand nine hundred and four, by and between Ratus Haws,
an unmarried person, of Muskogee, party of the first part, and
Robert P. de Graffenreid of Muskogee, party of second part.

Witnesseth: That the said party of the first part, for and in con-
sideration of the sum of One Thousand Dollars, in hand paid, the
receipt of which is hereby acknowledged, does hereby grant, bar-
gain, sell, convey and confirm unto said party of the second part,
the following described real estate and premises situate in Creek
Nation, and within the limits of the Indian Territory, to-wit:

All of my undivide- one half interest in and to the S. E. one
quarter of Section thirty three (33) in Township fifteen N. Range
eighteen (18) E. Being the land allotted to my former wife Agnes
Hawes, together with all the improvements thereon, and the ap-
purtenances and immunities thereunto belonging or in any wise
appertaining, and warrant the title to the same.

To have and hold the said lands unto the said party of the second part, his heirs, executors, administrators and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

his
RATUS x HAWS.
mark.

Witnesses:

STONEWALL TINGLE.
ANNIE TINGLE.

UNITED STATES OF AMERICA,

Indian Territory, Western Judicial District, ss:

Be it remembered, that on this day came before me, the undersigned, a Notary Public, within and for the said Western Judicial District of Indian Territory aforesaid, duly commissioned and acting as such, Ratus Haws to me personally well known as one of the parties grantor in the within and foregoing deed of conveyance, and stated that he executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby certify.

Witness my hand and seal as such Notary Public on this 22nd day of June, 1904.

(No Notary Seal.)

ANNIE TINGLE,
Notary Public.

My commission expires Jan. 16, 1908.

(Deed Endorsed:)

3887. Warranty Deed. From Ratus Haws to R. P. de Graffenreid. Indian Territory, Western District at Muskogee, Ind. Ter. I hereby certify that this instrument was filed for record in my office on June 23, 1904, at 9:50 o'clock A. M. and was duly recorded in record —, page —. R. P. Harrison, Clerk, by — —, Deputy. (Copy.)

(Amended Complaint Endorsed:)

5426. R. P. de Graffenreid vs. Louis Woodward and Peggie Woodward. Amended Complaint. Western Dist. Ind. Ter. Filed in open Court June 25, 1906. R. P. Harrison, Clerk U. S. Courts. De Graffenreid & Scruggs, Att'ys for Plaintiff.

91 Whereupon, on the same day, the 25th of June, 1906, a Notice to said defendants, Louis Woodward and Peggie Woodward, is issued out of the office of the Clerk of the United States Court for the Western District of the Indian Territory, at Muskogee, Indian Territory, commanding them to plead or answer herein by the 5th day of July, 1906.

And, thereafter, on the 2nd day of July, 1906, comes the United States Marshal and files in the office of the Clerk of the United States Court for the Western District of the Indian Territory at

Muskogee, Indian Territory, said notice with his return endorsed thereon.

Said notice and return are in words and figures as follows to-wit:

92 In the United States Court in the Indian Territory, Western District, at Muskogee.

5426. Equity.

ROBERT P. DE GRAFFENREID, Plaintiff,
vs.

LOUIS WOODWARD and PEGGIE WOODWARD, Defendants.

To Louis Woodward and Peggie Woodward:

You and each of you are hereby notified that on the 23rd day of June, 1906, the Court on motion of the plaintiff set aside and vacated the judgement heretofore rendered in this cause sustaining the demurrer to the plaintiff's complaint for the purpose of permitting the plaintiff to amend his said complaint, and that the plaintiff by permission of the Court did on the 25th day of June, 1906, file in this cause his amended complaint, and the court thereupon entered an order requiring you to plead to or answer said amended complaint within ten days from said 25th day of June, 1906, which will be July 5, 1906, 9 o'clock in the forenoon, and to all of which you will take due notice.

Witness the Honorable William R. Lawrence, Judge of the United States Court for the Western District of the Indian Territory at Muskogee this the 25th day of June, 1906.

[COURT SEAL.]

R. P. HARRISON, *Clerk*,
By C. S. BUCHER, *Deputy*.

The above notice came to my hands on the 25th day of June, 1906, and I executed the same on the 25th day of June, 1906, at 10 miles south-west of Muskogee, Indian Territory by then and there delivering to each of the within named defendants Louis Woodward and Peggie Woodward in person a true and correct copy of the above notice. Witness my official signature this 25 day of June, 1906.

LEO E. BENNETT,
United States Marshal,
By DAVID ADAMS, *Deputy*.

Western Dist. Ind. Ter. Filed July 2, 1906. R. P. Harrison,
Clerk U. S. Court.

93 And thereafter, on Tuesday, the 3rd day of July, 1906, the United States Court for the Western District of the Indian Territory, at Muskogee, Indian Territory, met pursuant to adjournment, the Hon. William R. Lawrence, Judge, presiding.

Present:

The Hon. William R. Lawrence, Judge; R. P. Harrison, Clerk; Leo E. Bennett, U. S. Marshal; William M. Mellette, U. S. Attorney.

Court having met in due form of law, the following proceedings were had, to-wit:

Equity. 5426.

R. P. DE GRAFFENREID

vs.

LOUIS WOODWARD and PEGGY WOODWARD.

And on this day the defendants make their appearance by their counsel, Jones and Merriweather, and move the court for leave to have until 9:00 A. M., July 16, 1906, to plead or answer herein. And the court being well and sufficiently advised in the premises doth allow said motion. And it is ordered that the said defendant be given until 9:00 o'clock A. M. July 16th, 1906, in which to plead or answer herein.

94 And afterwards, on Wednesday, the 16th day of July, 1906, the United States Court for the Western District of the Indian Territory, at Muskogee, Indian Territory, met pursuant to adjournment, the Hon. William R. Lawrence, Judge; presiding.

Present:

The Hon. William R. Lawrence, Judge; R. P. Harrison, Clerk; Leo E. Bennett, U. S. Marshal; William M. Mellette, U. S. Attorney.

Court having met in due form of law, the following proceedings were had, to-wit:

Equity. 5426.

R. P. DE GRAFFENREID

vs.

LOUIS WOODWARD and PEGGY WOODWARD.

And now comes the defendants and file their demurrer to the amended complaint herein.

Said demurrer is in words and figures as follows, to-wit:

In the United States Court for the Western District of the Indian Territory (at Muskogee).

ROBERT P. DE GRAFFENREID, Plaintiff,

vs.

LOUIS WOODWARD and PEGGIE WOODWARD, Defendants.

Demurrer to Amended Complaint.

Comes now the defendants, Louis and Peggie Woodward, and demurs to the complaint (amended) of the plaintiff herein, and for cause says:

(1) That plaintiff's complaint does not state facts sufficient to constitute a cause of action.

(2) That complaint of plaintiff is not sufficient in law to constitute a cause of action.

Wherefore defendants pray that complaint of plaintiff be dismissed, and for all other just, equitable and proper relief.

JONES & MERIWEATHER,
Attorneys for Defendants.

UNITED STATES OF AMERICA,

Western Judicial District of the Indian Territory:

Peggie Woodward, on oath states that she is one of the defendants in the above entitled cause; that the demurrer herein has been read to her; that she understands the contents of the same; and that the statements therein set forth are true to the best of her knowledge and belief.

her
PEGGIE x WOODWARD.
mark.

Witness to signature:
ARCHIE V. JONES.

Subscribed and sworn to before me this 9th day of July, 1906.

J. B. McCULLOCH,
Notary Public.

My commission expires April 22, 1908.

Western Dist. Ind. Ter. Filed in open Court July 11, 1906.
R. P. Harrison, Clerk of U. S. Courts.

96 And afterwards, on Friday, the 7th day of September, 1906, the United States Court for the Western District of the Indian Territory, at Muskogee, Indian Territory, met pursuant to adjournment, the Hon. William R. Lawrence, Judge presiding. Present: the Hon. William R. Lawrence, Judge; R. P. Harrison,

Clerk; Leo E. Bennett, U. S. Marshal; Wm. M. Mellette, U. S. Attorney.

Court having met in due form of law, the following proceedings were had, to-wit:

Equity. 5426.

R. P. DE GRAFFENREID

vs.

LOUIS WOODWARD and PEGGY WOODWARD.

And on this day comes on to be heard the defendants' demurrer, filed July 11th, 1906, to the amended complaint herein. And the Court having heard the argument of counsel and being well and sufficiently advised in the premises doth sustain said demurrer. Whereupon the plaintiff declines to plead further in this case and stands by his amended complaint and excepts to the ruling of the Court in sustaining said demurrer to said amended complaint. And it is ordered that said amended complaint be and the same is hereby dismissed for want of equity, to which ruling the plaintiff excepts and prays an appeal, which is granted. And it is agreed by the parties that a supersedeas bond be and the same is hereby fixed at \$300.00.

97 STATE OF OKLAHOMA,
Muskogee County, ss:

I, Tony Matney, Clerk of the District Court for the Third Judicial District, Muskogee County, Oklahoma, do hereby certify the above and foregoing to be a full, true, correct and complete transcript of the record and of all files and papers in case No. 5426, R. P. de Graffenreid vs. Louis Woodward and Peggie Woodward, as the same appears from the record of the United States Court for the Western District of the Indian Territory, at Muskogee, Indian Territory.

By law, the District Court for the Third Judicial District, Muskogee County Oklahoma, is the successor of said United States Court and the records of said United States Court are in the custody of said District Court and in my possession.

In witness whereof, I hereunto set my hand and affix the seal of said District Court, at my office in Muskogee, Oklahoma, in said Muskogee County, this 9th day of February, 1909.

[COURT SEAL.]

TONY MATNEY,
Clerk of Said District Court,
By E. A. COKER,
Deputy Clerk.

"In the United States Court of Appeals in the Indian Territory, June Term, 1907.

No. 830.

R. P. DE GRAFFENREID, Appellant,
vs.
LOUIS WOODWARD et al., Appellee.

Now on this day, this cause coming on for a hearing, on the motion to dismiss the appeal herein filed by the appellee, and the Court being fully advised in the premises, is of opinion that said motion should be sustained.

It is therefore, considered, ordered and adjudged by the Court that the appeal herein be, and is here and now, dismissed, and this cause is remanded to the United States Court for the Western District of the Indian Territory, sitting at Muskogee, for such action to be therein had, as to said Court may seem just and proper in the premises, the said appeal, notwithstanding.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of the Journal Entry in the above entitled cause, as the same appears of record in the Journal of the United States Court of Appeals, of the Indian Territory.

In witness whereof, I hereto set my hand and affix hereto the seal of said Court at Guthrie, this 12th day of February, 1909.

[SUPREME COURT SEAL.]

W. H. L. CAMPBELL, *Clerk*,
By W. M. BONNER, *Deputy*.

(5426) In the S. Dist. Ct. Ind. Ter. No. 188. De Graffenreid v. Woodward et al. Certified copy final order of U. S. Ct. of App. Ind. Ter. Lawrence & Lawrence, Attorneys at Law, Muskogee, Okla."

99 The court having heard the evidence, which is all of the evidence introduced by plaintiff and defendants, and having heard the argument of Counsel, takes this cause under advisement.

And thereafter, to-wit, on Saturday, the 24th day of July, 1909, the same being one of the days of the regular May, 1909 term of the District Court for the Third Judicial District, Muskogee County, Oklahoma, the Court being well and sufficiently advised in the premises, doth render judgement in favor of the Plaintiff, to which ruling of the Court the defendants at the time except.

And thereafter, to-wit, on Monday, the 26th day of July, 1909 the same being one of the days of the regular May, 1909, term of

the District Court for the Third Judicial District, Muskogee County, Oklahoma, comes the defendant, Peggy Woodward, and files motion herein for vacation of judgement and for new trial, said motion being in words and figures as follows, to-wit:

In the District Court, Muskogee County, State of Oklahoma.

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,

vs.

PEGGIE WOODWARD, Defendant.

Mo. of Defendant Peggie Woodward to Vacate Judgement and Grant New Trial.

The defendant, Peggie Woodward, by her attorneys, Lawrence & Lawrence, move the court to vacate herein the findings and verdict of the court, and for cause thereof says:

(1st The findings and verdict of the Court is not sustained by sufficient evidence and is contrary to law.

2nd. Error of law occurring at the trial and excepted to by said defendant.

PEGGY WOODWARD, *Def't*,
By LAWRENCE & LAWRENCE,
Her Att'ys.

100 Said motion is endorsed on back as follows: 188. De Graffenreid v. Peggie Woodward. Mo. of defendant Peggie Woodward for vacation of judg't deed for new trial. State of Oklahoma, County of Muskogee. Filed Jul- 26, 1909. W. P. Miller, District Clerk. Lawrence & Lawrence, att'ys for def't.

And thereafter, to-wit, on Tuesday, the 27th day of July, 1909, the same being one of the days of the regular May, 1909 term of the District Court for the Third Judicial District, Muskogee County, Oklahoma, the honorable John H. King, Judge, presiding, come all the other defendants herein and file a motion for new trial, said motion being in words and figures as follows, to-wit:

In the District Court for Muskogee County, Oklahoma.

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,

vs.

PEGGIE WOODWARD et al., Defendants.

Motion for a New Trial.

Come now the defendants, Viola Woodward, Sammie Woodward and Jessie Gains, minors, by their guardian, Richard Woodward,

and also come Richard Woodward and Annie Sanders and move the Court to set aside the decree herein rendered and to grant them a new trial for the following reasons:

- (1) Because the said decree is contrary to the law.
- (2) Because the said decree is contrary to the evidence.
- (3) Because the Court erred in holding that this matter

101 had not been formerly adjudicated.

GIBSON & THURMAN,
Attorneys for Defendants.

Said Motion is endorsed on back as follows: No. 188. Rob't P. de Graffenreid, Plaintiff, vs. Peggie Woodward, et al., Defendants. Motion for a new trial. State of Oklahoma, County of Muskogee. Filed Jul- 27, 1909. W. P. Miller, District Clerk. Gibson & Thurman, Muskogee, Oklahoma, Attorneys for Defendants.

Whereupon, the Court having heard said motion for new trial, and being well and sufficiently advised in the premises, doth overrule the same and render final judgment herein, said judgment being in words and figures as follows, to-wit:

STATE OF OKLAHOMA,
County of Muskogee:

In the District Court, Third Judicial District, Sitting at Muskogee.

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,
vs.

PEGGIE WOODWARD, ANNIE SANDERS, and SAMMIE WOODWARD,
Viola Woodward, and Jessie Gains (the Last Three Named Being
Minors), of Richard Woodard, Their Guardian, Defendants.

Judgment.

This action coming on for trial, the plaintiff being present in person and represented by his attorney, Charles A. Cook. Esq., and the defendant, Peggy Woodard, being present in person and represented by her attorneys, Messrs. Lawrence & Lawrence and Richard Woodward in his own behalf and as guardian of
102 Sammie Woodard, Viola Woodard and Jessie Gains, and Annie Sanders, being present in person and represented by Messrs. Gibson & Thurman, their attorneys, and the right of a jury trial having been waived by all the parties, and being tried in its regular order before the court upon the pleadings, agreed statement of facts and evidence introduced by the respective parties; and the court having found all the issues of fact in favor of the plaintiff, and now upon the 26th day of July, 1909, the defendant, Peggie Woodard, files her motion for a new trial; and on the 27th day of July, 1909, the other said defendants file their motion for a new

trial; and said motions coming on for hearing and the court being fully advised in the premises doth overrule said motions to which ruling of the court all of said defendants then and there duly excepted.

It is therefore considered, ordered and adjudged by the court that the plaintiff, Robert P. de Graffenreid, is the owner in fee of an undivided one-half interest in the following described land, to-wit:

The Southeast quarter of Section Thirty three Township Fifteen (15) North, Range Eighteen (18) East, the entire tract containing One Hundred Sixty (160) acres,

and that he recover against the defendants his said moiety and that he be let into possession of the said land as tenant in common and recover against the defendants his costs of this suit to be taxed by the clerk.

To all of which the defendants excepted. Whereupon the defendants are allowed sixty days to prepare and serve a case made; the plaintiff allowed ten days thereafter to suggest amendment; 103 the same to be settled on five days' notice. The defendants are ordered to file within twenty days a Supersedeas bond in the sum of Five Thousand (\$5,000.00) Dollars with sureties to be approved by the Clerk of this Court.

JOHN H. KING, *Judge.*

And thereafter, to-wit, on the 6th day of August, 1909, come the defendants and file in the office of the Clerk of the District Court for the Third Judicial District, Muskogee County, Oklahoma, a supersedeas bond herein, which bond is in words and figures as follows, to-wit:

In the District Court of Muskogee County, Oklahoma.

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,

vs.

PEGGIE WOODWARD et al., Defendants.

Supersedeas Bond.

Know all men by these presents: That Peggie Woodward, Richard Woodward, Annie Sanders; and Viola Woodward, Jessie Gains, and Sammie Woodward, minors, by Richard Woodward, their legal guardian, principal obligors, and Southern Surety Company, a corporation, as surety, are held and firmly bound unto Robert P. de Graffenreid, plaintiff in the above entitled cause in the sum of Five Thousand (\$5,000.00) Dollars, for the payment of which well and truly to be made we, and each of us do hereby jointly and severally bond ourselves, our successors and assigns.

Dated this 5th day of August, 1909.

104

The condition of the foregoing obligation is such that, Whereas, on the 31st day of July, 1909, judgement was

rendered in favor of said obligee, the plaintiff in said cause and against the said principal obligors, defendants in said cause for the possession of an undivided one-half of the southeast quarter of Section Thirty three (33) Township Fifteen (15), North, Range Eighteen (18) East, in said County and State, and for the costs of suit, and

Whereas, said defendants have taken an appeal from said judgment to the Supreme Court of Oklahoma.

Now therefore, if the said principal obligors herein shall, pay to the said obligee all damages that may result because of the taking of said appeal and the costs in case judgement or final order shall be adjudged against them; then this obligation shall be void; otherwise to remain in full force and effect.

her
PEGGIE x WOODWARD,
mark
her
ANNIE x WOODWARD,
mark

Witness- to both marks:

WILLIAM R. LAWRENCE.
FRED C. LAWRENCE.

RICHARD WOODWARD,
VIOLA WOODWARD,
SAMMIE WOODWARD,
JESSIE GAINS,

Minors,

By RICHARD WOODWARD,
Their Guardian.

SOUTHERN SURETY COMPANY,

By E. G. DAVIS, *Secretary.*

[Southern Surety Company Seal.]

Taken and approved this 6th day of August, 1909.

W. P. MILLER, *Clerk,*
By ROSS HOUCK, *Deputy.*

105 Said bond is endorsed on back as follows: 188. De Graffenreid v. Woodward et al. Appeal Bond. State of Oklahoma, County of Muskogee. Filed Aug. 6, 1909. W. P. Miller, District Clerk. Bond Record 2, Page 476.

106

Certificate of Attorneys.

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,

vs.

PEGGY WOODWARD et al., Defendants.

We hereby certify that the foregoing case made contains a full, true, correct and complete copy and transcript of all the proceedings

in said cause, including all pleadings filed and proceedings had, all the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed, and all of the record upon which the judgement and journal entry in said cause were made and entered, and that the same is a full, true, correct and complete case made.

Witness our hands this — day of —, 1909.

_____,
Attorneys for Defendant.

107

Acceptance of Service.

STATE OF OKLAHOMA,
Muskogee County, ss:

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,
vs.
PEGGY WOODWARD et al., Defendants.

I, the undersigned attorney for the plaintiff in the foregoing suit, certify that the foregoing case — was duly served on me this 17 day of September, 1909.

CHARLES A. COOK,
Attorney for —.

108

Stipulation of Attorneys.

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,
vs.
PEGGY WOODARD et al., Defendants.

It is hereby stipulated and agreed by and between the parties hereto that the foregoing case made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered and introduced, all the orders and rulings made and exceptions allowed and all of the records upon which the judgment and journal entry in said cause were made, and the same is a full, true, complete and correct case made; and the said plaintiff waives the right to suggest amendments to said case made and hereby consents that the same may be settled immediately and without notice, and hereby joins in the request of the defendant- that the judge of said court settle the same and order the same certified to the clerk of the district court and filed according to law; the said plaintiff hereby

waives the issuance and service of summons in error from the Supreme Court of the State of Oklahoma.
September 27, 1909.

CHAS. A. COOK,
Attorneys for Plaintiff.
LAWRENCE & LAWRENCE,
Attorneys for Defendants Peggie Woodward.
GIBSON & THURMAN,
Att'ys for Other Def'ts.

Filed Jun- 27, 1910. W. H. L. Campbell, Clerk.

109

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,
VS.
PEGGY WOODWARD et al., Defendants.

This is to certify that the foregoing above case made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth, and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgements had in such cause; and I hereby settle, allow, certify and sign the same as true and correct and hereby order that the clerk of the district court attest the same with the seal of said court, and file the same of record.

Dated September 30, 1909.

JOHN H. KING, *Judge.*

Attest:

[COURT SEAL.] W. P. MILLER, *Clerk.*

110 Original Case Made endorsed on back as follows: 188.
Robert P. de Graffenreid vs. Peggy Woodward et al. Case
Made. State of Oklahoma, County of Muskogee. Filed Oct. 5,
1909. W. P. Miller, District Clerk.

Clerk's Certificate.

STATE OF OKLAHOMA,
County of Muskogee, ss:

In the District Court for the Third Judicial District, Muskogee
County, Oklahoma.

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,
VS.
PEGGY WOODWARD et al., Defendant.

I, W. P. Miller, Clerk of the District Court for the Third Judicial
District of Muskogee County, Oklahoma, do hereby certify the above

and foregoing to be a full, true, correct and complete copy of the original Case Made in the above entitled cause filed in my office.

In Witness Whereof, I hereunto set my hand and affix the seal of said District Court at my office in Muskogee, Oklahoma, this 6th day of October, 1909.

[District Court Seal.]

W. P. MILLER, *Clerk*,
By ROSS HOUCK, *Deputy*.

111

No. 1814.

PEGGIE WOODWARD et al., Plaintiff- in Error,
vs.

ROBERT P. DE GRAFFENREID, Defendant in Error.

*Transcript of Record, Case Made, and Petition in Error of Plaintiff-
in Error.*

Filed June 27, 1910. W. H. L. Campbell, Clerk.

William R. Lawrence, Att'y for Plaintiff- in Error, Muskogee,
Okla.

112

In the Supreme Court of Oklahoma.

No. —

PEGGY WOODWARD et al., Plaintiff- in Error,
vs.

ROBERT P. DE GRAFFENREID, Defendant in Error.

Stipulation of Council.

It is hereby agreed and stipulated by and between the parties to the above entitled action on appeal that the Defendant in Error shall be granted leave until Oct. 1, 1910, to serve and file his brief in answer to the brief of Plaintiff- in Error.

WILLIAM R. LAWRENCE,
Attorney for Peggie Woodward.

H. A. GIBSON,
Attorney for Richard Woodward et al.
CHARLES A. COOK,
For Defendant in Error.

In the Supreme Court.

Pursuant to the above stipulation it is ordered that the Defendant in Error have leave until December 1, 1910, to serve and file his brief in answer to the brief of Plaintiff- in Error.

(Endorsed:) 1814. Stipulation to file Briefs. Filed Aug. 23, 1910. O. K. W. H. L. Campbell, Clerk.

113 And thereafter, to-wit: on the 23rd day of August, 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, July Term, 1910, August 23rd, 1910, Tenth Judicial Day.

1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,
VS.
ROBT. P. DE GRAFFENRIED, Defendant in Error.

And now on this day it is ordered by the court that the stipulation herein that defendant in error have to October 1, 1910, to file brief, be, and the same is hereby allowed.

114 In the Supreme Court.

No. —.

PEGGY WOODWARD et al., Plaintiff- in Error,
VS.
ROBERT P. DE GRAFFENREID, Defendant in Error.

Motion.

Motion of Defendant in Error to Extend Time to File Brief in Reply to Plaintiffs' Brief.

Comes now the Defendant in Error, Robert P. de Graffenried, and moves the court to extend the time for him to serve and file his brief in answer to the brief of Plaintiff- in Error until December 1, 1910.

Attached to this motion is the consent to same by Gibson & Thurman, Attorneys for Richard Woodward et al., and also the notice of this motion duly accepted by William R. Lawrence, attorney for Peggy Woodward.

Respectfully submitted,

CHARLES A. COOK,
Att'y for R. P. de Graffenried,
Def't in Error.

115

In the Supreme Court of Oklahoma.

No. —.

PEGGIE WOODWARD et al., Plaintiff- in Error,

vs.

ROBERT P. DE GRAFFENREID, Defendant in Error.

Stipulation of Counsel.

It is hereby agreed and stipulated by and between the parties to the above entitled action on appeal that the Defendant in Error shall have leave extended until December 1, 1910, to serve and file his brief in answer to the brief of Plaintiff- in Error.

_____,
Attorney for Peggie Woodward.

GIBSON & THURMAN,

Attorneys for Richard Woodward et al.

CHARLES A. COOK,

For Defendant in Error.

In the Supreme Court.

Pursuant to the above stipulation it is ordered that the Defendant in Error have leave until December 1, 1910 to serve and file his brief in answer to the brief of Plaintiff- in Error.

116

In the Supreme Court of Oklahoma.

No. —.

PEGGY WOODWARD et al., Plaintiff- in Error,

vs.

ROBERT P. DE GRAFFENREID, Defendant in Error.

Notice of Motion.

To W. R. Lawrence, Attorney of Record for Peggy Woodward, one of the Plaintiffs in Error in the above-entitled action:

You will please take notice that the defendant in error on the 20th day of October, 1910, will move the court to grant him leave until December 1st, 1910, to serve and file his brief in answer to the brief of the plaintiff in error in the above entitled action.

This the 17th day of October, 1910.

CHARLES A. COOK,

Attorney for Defendant in Error.

Muskogee, Okla., Oct. 17th, 1910.

I hereby accept service of above notice and copy of same.

PEGGIE WOODWARD,
Plff in Error,
 By WILLIAM R. LAWRENCE,
Her Attorney.

Endorsed on Back: No. 1814. Peggie Woodward, et al., Pl'ff in Error, vs. Rob't P. de Graffenried, Def't in Error.—Motion to extend time for Def't in Error to file brief. Notice & Stipulation. Filed Oct. 20, 1910. W. H. L. Campbell, Clerk. Charles A. Cook, Att'y for Def't in Error.

117 And thereafter, to-wit: On the 26th day of October, 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1910, October 26th, 1910,
 Eighteenth Judicial Day.

1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,
 VS.
 ROB'T P. DE GRAFFENRIED, Defendant in Error.

And now on this day it is ordered by the court that the stipulation herein that defendant in error have to December 1, 1910, to file brief, be, and the same is hereby allowed.

118 In the Supreme Court of the State of Oklahoma.

PEGGY WOODWARD et al., Plaintiff- in Error,
 VS.
 R. P. DE GRAFFENRIED, Defendant in Error.

Comes now the Defendant in error, and moves the Court to grant him an extension of time to file reply brief until the 1st day of February, 1911, for the reason that attorney for Defendant in error, has not, as yet, been able to prepare said brief because of pressing business engagements.

CHAS. A. COOK,
Attorney for Defendant in Error.

Endorsed on Back: 1814. O. K. Acted on. Filed Dec. 9, 1910.
 W. H. L. Campbell, Clerk.

119 And thereafter, to-wit: on the 29th day of November, 1910, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, November Term, 1910, November 29th, 1910,
Fifth Judicial Day.

1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,

vs.

R. P. DE GRAFFENRIED, Defendant in Error.

And now on this day it is ordered by the court that the stipulation herein that appellee have to February 1, 1911, to file brief, be, and the same is hereby allowed.

120 In the Supreme Court of the State of Oklahoma.

PEGGIE WOODWARD et al., Appellant,

vs.

R. P. DE GRAFFENRIED, Appellee.

It is hereby stipulated and agreed that attorneys for appellee shall have an extension of time to February 1, 1911, to file reply brief in the above entitled cause.

Attorneys for Appellant, PEGGIE WOODWARD.

GIBSON & THURMAN,

Attorneys for Other Appellants.

CHARLES A. COOK,

Attorneys for Appellees.

Endorsed on Back: 1814. Filed Dec. 9, 1910. W. H. L. Campbell, Clerk.

121 In the Supreme Court of the State of Oklahoma.

No. 1814.

PEGGY WOODWARD et al., Plaintiffs in Error,

v.

ROBERT P. DE GRAFFENREID, Defendant in Error.

Motion to Dismiss.

Comes now Robert P. de Graffenreid, defendant in error, and moves that the case-made filed herein, and the petition in error and appeal be dismissed for the following reasons:

1. The case-made does not contain the averment by way of recital that it contains all the evidence submitted or introduced on the trial of the cause.

2. The case-made is not so certified that it may be considered as a transcript.

JOSEPH C. STONE,
Of Counsel for Defendant in Error.

122

Brief Supporting Motion to Dismiss.

The case-made purports to contain the evidence, but the record contains no recital or other statement that it contains all the evidence introduced in the trial of the cause. There is, however, at page 84 a certificate by the attorneys for plaintiffs in error reciting, among other things, that "the foregoing case-made contains—all the evidence offered or introduced by both parties," and at page 86 a certificate or stipulation signed by counsel for plaintiffs in error and by counsel for defendant in error reciting, among other things, that "the foregoing case-made contains—all the evidence offered or introduced." Both these certificates are without any effect. This court cannot consider a case-made unless it contains a positive averment by way of recital that it contains all the evidence submitted or introduced in the trial of the cause. A certificate of counsel, or the certificate of the court stenographer, the certificate of the trial judge or all of them combined in the absence of such recital in the case-made itself avail nothing.

This rule which is now well settled in this jurisdiction had its origin, its development and finally its full acceptance in the necessity recognized by the courts of last resort of preventing the presentation of moot questions for determination. Where lawyers are not restrained by a strict rule, they sometimes yield to temptation and present moot questions, actually inserting as evidence that which was not introduced, or, omitting evidence that was in fact introduced. Nothing is easier than to procure the signature of a judge settling the case where attorneys have signed a certificate that it contains all the proceedings and evidence. Hence, the rule several times
123 announced by this court, that certificate of counsel cannot be considered. The case-made itself must declare in itself by way of recital and not by mere label of counsel that it contains all the evidence. The case-made must declare itself and cannot be known by a badge or certificate attached thereto by counsel.

The case of *Wagner v. Sattley Manufacturing Company*, 90 Pac. 643, and the authorities there cited by Justice Hayes are quite sufficient for the purposes of this motion. In the *Wagner* case this court squarely decided, following the Territorial Supreme Court, that the certificate of counsel is without effect, and that the case-made must contain in the record proper by way of recital, a statement that the case contains all the evidence introduced in the trial of the case. The court's opinion is in part as follows:

"This court cannot therefore review the assignment of error urged. *Exendine v. Goldstine*, 14 Okl. 100, 77 Pac. 45; *Sawyer & Austin Lbr. Co., v. Champlain Lbr. Co.* 16 Okl. 90, 84 Pac. 1093; *Martin v. Gassett*, 17 Okl. 177, 87 Pac. 586; *Schriber v. Buckner*, 18 Okl.

298, 90 Pac. 10. The record contains a certificate of the stenographer in which he certifies that the evidence contained in the case-made is a correct and complete transcript of all his shorthand notes of all the evidence introduced or offered on the trial; but this certificate of the stenographer is unauthorized and cannot be permitted to supply the requirements of the rule that the case made must contain a specific averment that the record contains all the evidence introduced on the trial. Mr. Chief Justice Burford in *Sawyer & Austin Lumber Co. v. Champlain Lumber Co.* supra in discussing this proposition said: "The case-made purports to contain the evidence, but the record contains no recital or other statement that it contains all the evidence introduced in the trial of the cause. There is a certificate of counsel that the case — contains all the evidence also a certificate of the stenographer that his transcript contains all the evidence; but neither of these certificates are authorized or recognized. The case-made itself must contain the positive averment by way of recital that it does contain all the evidence submitted or introduced on the trial of the cause, and in the absence of such recital this court will not review any question depending upon the facts for its determination."

124 The case of *Tootle Wheeler & Motter Mercantile Company v. Floyd*, 114 Pac. 259 is in point. The opinion of the court upon this question is as follows:

"The case-made does not contain a positive averment by way of recital that it contains all the evidence submitted or introduced on the trial of the cause. In the absence of such recital in the case-made, this court will not review any question depending upon the facts for its determination. *Wagner v. Sattley Mfg. Co.* 23 Okla. 52, 99 Pac. 643. Such omission in the case-made cannot be supplied by the certificate of the trial judge. *Martin et al. v. Gassett*, 17 Okl. 177 87 Pac. 586.

In *Chelsea Elevator & Storage Company v. Rohland*, 118 Pac. 366, Judge Ames, in delivering the opinion of the court, said

"We cannot, however, consider these assignments of error, for the reason that the case-made does not contain any recital whatever, except a certificate of the clerk, that all the evidence is embraced within it. It has frequently been decided by this court that questions depending upon the facts cannot be considered, unless the case-made contains an averment by way of recital that it embraces all the evidence. *Finch et al. v. Brown, et al.*, 27 Okl. 217; 111 Pac. 391.

It has also been decided that such omissions in the case-made cannot be supplied by a certificate of the stenographer. *Tootle Wheeler — Motter Mer. Co. v. Floyd*, 114 Pac. 259. It has also been decided that a recital in the order of the court settling the case-made is not a compliance with the rule. *Wade v. Gould*, 8 Okl. 690, 59 Pac. 11. If a certificate of the stenographer who took the evidence is not sufficient, and a certificate of the judge before whom the evidence is heard is not sufficient, then it follows that a certificate of the clerk, who had nothing to do with the evidence, cannot take the place of the recital required."

See also Gaffney v. Stanard No. 1256 decided March 12, 1912 holding certificate of counsel insufficient:

125 The original case-made on file with the district clerk at Muskogee contains no certificate which could authorize this court to consider the case-made as a transcript. Although we have not had an opportunity to examine the case on file in the Supreme Court, we assume that it is in the same condition, and if so, there is nothing to consider, not even the record proper.

Respectfully submitted,

JOSEPH C. STONE,

Of Counsel for Defendant in Error.

Endorsed on back: No. 1814. Peggy Woodward et al., Plaintiff in error, vs. Robert P. de Graffenreid, Defendant in Error. Motion to Dismiss and Brief Supporting same. Filed Mar. 18, 1912. W. H. L. Campbell, Clerk.

126 In the Supreme Court of the State of Oklahoma.

No. 1814.

PEGGY WOODWARD et al., Plaintiffs in Error,

vs.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Notice.

To Robert P. de Graffenried, Defendant in Error:

Your are hereby notified that we will, on the 19th day of March, 1912, present to the Supreme Court of the State of Oklahoma, the attached response to motion to dismiss.

W. R. LAWRENCE,

GIBSON & THURMAN,

Attorneys for Plaintiffs in Error.

Service of the foregoing response to motion to dismiss accepted this 18th day of March, 1912.

OWEN & STONE,

Attorneys for Defendant in Error.

127 In the Supreme Court of the State of Oklahoma.

No. 1814.

PEGGY WOODWARD et al., Plaintiffs in Error,

vs.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Response to Motion to Dismiss.

Come now the plaintiffs in error and for their response to the motion to dismiss this proceeding in error, which motion is based upon the alleged failure to include therein a statement in the form of a recital that "the foregoing case-made contains all of the evi-

dence offered or introduced upon the trial of this cause," and respectfully show to this Honorable Court that at the top of page 77 of the said case-made there is a statement by way of recital that the evidence contained in the case-made is all of the evidence introduced by plaintiff and defendant.

The case-made also contains a stipulation of counsel for both plaintiffs in error and defendant in error that the case-made does contain all of the evidence introduced upon the trial of the cause.

We readily recognize the justice of the rulings of this Honorable Court in the various cases cited by defendant in error in support of the motion to dismiss, and can easily see that the purpose of this rule is to prevent the submission of moot cases to the Court; but, in view of the fact that the purpose of the case-made is to bring before the Court so much of the record as may be necessary to determine the correctness of the rulings complained of, we do not believe that it was ever the purpose of the law makers in providing for proceedings in error by case-made to require absolutely all of the evidence and proceedings in the case unless such evidence or proceedings would be necessarily examined in the determination

of the errors complained of. We can easily see where a statement of counsel not contained in the case-made, or one from a clerk stenographer, or even the judge, might with all propriety be held not to require a recital that the case made contained all of the evidence introduced upon the trial of the case. But we respectfully submit that it was never the intention of the law-makers or of any court following the rule requiring such a recital to prevent meritorious appeals by mere technicalities. And we further submit that the recital contained on top of page 77 is in substance a compliance with every rule of practice with regard to statement as to the contents of the case-made; and furthermore, that the stipulation of counsel signed by the representatives of both parties should in the absence of a suggestion of omission from the case-made be held to be conclusive of the correctness of the statement contained on page 77, and should be held to be a substantial compliance with the rule of this court and the law upon this point.

We must admit that we have not always subscribed to the decree of "harmless error," but we do respectfully submit that the error, if any has been committed in the preparation of this case-made, is certainly harmless, has not misled the defendant in error or his counsel, and has not prevented the Court from having a complete record before it to be used in the determination of this proceeding.

In the event, however, that the Court should hold that the said recital and the said stipulation do not amount to a substantial and sufficient compliance with the rule requiring the recital as to the contents of the case-made, we respectfully pray that plaintiffs in error be permitted to withdraw the case-made for correction and to insert therein the statement in the usual form that "this is all of the evidence introduced upon the trial of the cause."

Respectfully submitted,

W. R. LAWRENCE,
GIBSON & THURMAN,
Attorneys for Plaintiffs in Error.

Endorsed on back as follows: No. 1814. Peggy Woodward et al., Plaintiffs in error, vs. Robert P. de Graffenried, Defendant in error. Response to Motion to Dismissed. Filed Mar. 19, 1912, W. H. L. Campbell, Clerk.

129 And thereafter, to-wit: on the 19th day of March, 1912, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, March Term, 1912, March 19th, 1912, Sixth Judicial Day.

1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,

VS.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Now on this day the above cause is argued orally, and the cause is submitted on the record, briefs and oral argument.

130 And thereafter, to-wit: on the 30th day of April, 1912, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, March Term, 1912, April 30th, 1912, Fifteenth Judicial Day.

1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,

VS.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

And now on this day it is ordered by the court that plaintiffs in error in the above entitled cause be and they are hereby given thirty days to amend case made, and if not amended in that time, case will be dismissed.

131

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,

VS.

PEGGY WOODWARD et al., Defendants.

This is all the evidence offered or introduced upon the trial of this Cause.

132

No. 188.

ROBERT P. DE GRAFFENREID, Plaintiff,
vs.
PEGGY WOODWARD et al., Defendants.

I, John H. King, late Judge of the Third Judicial District of the State of Oklahoma, and the trial judge before whom the above entitled cause was tried and determined, do hereby certify that on this 23rd day of May, 1912, the parties in the above entitled action appeared before me in accordance with an order of the Supreme Court of the State of Oklahoma, made and entered in case No. 1814, entitled Peggy Woodward et al., plaintiffs in Error v. R. P. de Graffenreid, Defendant in Error, which proceeding in error was prosecuted from the decision rendered in the above entitled cause in the said Court sitting in and for the said Muskogee County, State of Oklahoma, and Plaintiffs in Error asked leave to amend the case-made in said appellate proceeding made and filed in the Supreme Court of the State of Oklahoma by adding after the end of page 76 of said case-made the following words:

"This is all the evidence offered or introduced upon the trial of this cause,"

Whereupon the Defendant in Error by his attorneys appeared and objected to further proceedings upon the ground that the said John H. King, the former judge before whom this cause was tried, is without authority to sign, settle or amend the case-made herein, and for the further reason that the proposed amendment is not authorized by law. All of which objections are overruled, and the amendment prayed for by Plaintiffs in Error, as fully appears upon the sheet hereto attached, Numbered 76½, is allowed, and the case-made as so amended and corrected is true and correct, and contains a true and correct statement of all the pleadings, motions, evidence, findings, proceedings and judgments, had in such cause,
133 and I hereby settle, allow, certify and sign the same as true and correct, to all of which the defendant in error excepts.

Witness my hand this 23rd day of May, 1912, at Muskogee, Oklahoma.

JOHN H. KING,
Late Judge of the Third Judicial District,
State of Oklahoma.

Endorsed on the back: No. 1814, Peggy Woodward et al., Plaintiff in Error, vs. R. P. de Graffenreid, Defendant in Error. Amendment of case-made. Filed May 24, 1912, W. H. L. Campbell, Clerk.

134 In the Supreme Court of the State of Oklahoma.

No. 1814.

PEGGY WOODWARD et al., Plaintiffs in Error,
vs.
ROBERT P. DE GRAFFENREID, Defendant in Error.

Motion to Strike Amendment to Case-made.

Comes now Robert P. de Graffenreid, defendant in error, and moves that the amendment to the case-made herein be stricken for the following reasons, to-wit:

First.

Said amendment was settled and signed on the 23rd day of May, 1912, by the Honorable John H. King, the trial judge, whose term of office expired long prior to said signing, and no order was made within his term of office extending the time for signing the case beyond his term.

Second.

Said amendment was made and filed in the Supreme Court more than a year after the rendition of the final judgment from which the appeal is taken.

J. C. STONE,
Of Counsel for Defendant in Error.

135

Brief Supporting Same.

The defendant in error makes two propositions:

First.

The signing of a case is a judicial act and can therefore be performed only within the term of the trial judge or within a period after the term, fixed within the term by an order of extension. Such order of extension operates to extend the jurisdiction of the judge so that even after the expiration of his term, he may act judicially. There is a long line of Kansas and Oklahoma cases sustaining this proposition, and these authorities are in accord with the weight of authority. See Brief heretofore filed upon behalf of defendant in error.

Second.

The statute fixes a limitation period for perfecting in the Supreme Court a record which may be reviewed. A party desiring to appeal must have within the Supreme Court a record capable of review within the limitation period. The statute authorizing amendments at any time prior to the submission of a case upon appeal is limited

in its operation by the statute prescribing the time limit within which the appeal must be perfected. See *Walcher vs. Stone* (Okl.) 79 Pac. 771. The case-made is not certified as a transcript and may not be considered as a transcript. The appeal should be dismissed.

Respectfully submitted,

J. C. STONE,

Of Counsel for Defendant in Error.

136 [Endorsed:] No. 1814. Peggy Woodward et al., Plaintiffs in Error, vs. Robert P. de Graffenreid, Defendant in Error. Motion to Strike Amendment to Case-Made and Brief Supporting Same. J. C. Stone, of Counsel for Defendant in Error. Filed Jun-8, 1912, W. H. L. Campbell, Clerk.

137 And thereafter, to-wit: on the 17th day of September, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1912, September 17th, 1912,
Seventh Judicial Day.

1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,

vs.

ROBERT P. DE GRAFFENREID, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause, be, and the same is hereby affirmed.

Opinion by Rosser, C.

By the COURT: It is so ordered, the above opinion is adopted in whole, and judgment entered accordingly.

138 In the Supreme Court of the State of Oklahoma.

Filed Sep. 17, 1912.

No. 1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,

v.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Error from District Court, Muskogee County.

John H. King, Judge.

Syllabus.

1. Where a woman, enrolled as a Creek Freedman, selected an allotment under the provisions of Section 11 of the Curtis Bill, and died before the adoption of the original Creek Treaty, and the land so selected was allotted to her heirs after her death, the Creek law of descent and distribution governs the descent of the land, and the Arkansas law of descent and distribution does not apply.
2. A husband, not a member of the Creek Nation, may inherit land as heir to his wife under the Creek law of descent and distribution.
3. Where a Creek freedman selected her allotment in accordance with Section 11 of the Curtis Bill, and died before the adoption of the original Creek Treaty, the fee did not vest in her in her life time, but was first vested in her heirs by the provisions of Section 6 and Section 28 of the original Creek Treaty.
4. Where a Creek freedman selected an allotment under the provisions of Section 11 of the Curtis Bill, but died before the adoption of the original Creek Treaty, and the land was afterward allotted and patented to her heirs, no part of her allotment was impressed with homestead character, and all restrictions upon the alienation of such land, including the portion that would have been homesteaded had the allotments been made to the allottee in her life time, were removed by the Act of Congress approved April 21, 1904.
5. A petition for partition brought on the equity side of the docket in the United States Court, for the Indian Territory, prior to statehood, showed that the defendants in the partition suit were in possession of the land of which partition was sought, holding it adversely to the plaintiff. The Court sustained a demurrer to the petition and dismissed the action. Held: That the judgment in said partition suit was not a bar to an action in ejectment by the same plaintiff against the same defendants to establish plaintiff's title to the land.

Action by Robert P. de Graffenried against Peggie Woodward, Annie Sanders, Sammie Woodward, Viola Woodward and Jessie Gains, and Richard Woodward, Guardian. Judgment for plaintiff, and defendants appeal.

Affirmed.

William R. Lawrence, Gibson & Thurman, for Plaintiffs in Error.
Chas. C. Cook, J. C. Stone, for Defendant in Error.

140

Opinion by Rosser, C.

This was an action brought in the District Court of Muskogee County, March 25th, 1908, by R. P. de Graffenried against Louis and Peggie Woodward to recover an undivided half interest in certain lands in that county. The property involved in the litigation is a half interest in the allotment of Agnes Hawes. Agnes Hawes was a full blood negro woman, enrolled on the rolls of the Creek tribe as a Creek freedman. Louis Woodward was her father and Peggy Woodward her mother. Her husband, Ratus Hawes, was not enrolled and was neither citizen nor freedman, of the Creek Nation. Agnes Hawes selected her allotment of lands in accordance with section 11 of the Act of Congress of June 28th, 1898, commonly called the Curtis Bill. On the 29th of June, 1900, Ratus Hawes shot and killed his wife. He was tried upon a charge of murdering her, convicted of manslaughter and served a term in the penitentiary for the crime. After the death of Agnes Hawes, and after the ratification of the treaty of March 1st, 1901, between the United States and the Creek Tribe of Indians, sometimes known as the original Creek Treaty, the Dawes Commission awarded and allotted the land to her heirs and a patent was issued in the name of her heirs April 1st, 1904. Agnes Hawes left no children or grandchildren surviving her, but left surviving her Louis Woodward, her father, Peggy Woodward, her mother, and Ratus Hawes, her husband. On the 22nd day of June, 1904, Ratus Hawes executed to plaintiff a warranty deed to an undivided one-half interest in the allotment. On the 2nd day of July, 1904, the plaintiff
141 de Graffenried, brought an action in equity in the United States Court for the Western District of the Indian Territory, at Muskogee, against Louis and Peggie Woodward, to partition the land. A demurrer was sustained to the original complaint in that case. The plaintiff then filed an amended complaint in which he alleged his ownership of a half interest in the land by virtue of the conveyance from Ratus Hawes, that Louis and Peggie Woodward were in possession, refusing to recognize plaintiff's right to any portion of the land or to the rents and revenue, and that the land was capable of partition. The complaint concluded with a prayer that the land be partitioned. The Court sustained a demurrer to the amended complaint and the plaintiff, declining to plead further, dismissed the complaint. The defendants plead the proceedings and judgment in that suit in bar of the present suit. After the

present suit was brought Louis Woodward died, and the suit was revived in the name of his heirs.

The parties waived a jury and tried the case to the Court. There was a judgment for plaintiff, and defendants appeal.

There are five questions presented by the defendants. The first is whether or not the Creek law of descent and distribution, or the Arkansas Law of descent and distribution, controls the devolution of the estate. The defendants take the position that the law in force June 28th, 1900, controls. Their contention is that when Agnes Hawes selected her allotment under the provisions of the Curtis Bill her allotment was perfected, and had become vested and absolute in her before her death, at which time the Arkansas Law of descent and distribution was in force in the Creek Nation. If the

142 selection of the land by Agnes Hawes in her life time, under the provision of section 11 of the Curtis Bill, had vested title in her the contention could be sustained, but this Court, in the case of *Barnett vs. Way*, 29 Okla. 780, 119 Pac. 418, held that the selection of the allotment under the provisions of section 11 of the Curtis Bill, did not vest the allottee with any title to the fee in the land, and that no way was provided, under the provision of that Act, for the allottee to obtain title, and that a method by which the allottee could obtain title was first provided by the original Creek Treaty, (Act March 1, 1901, 31 Stat. L. 681). It was held that an allotment under section 11 of the Curtis Bill only carried the use and possession of the land that was allotted, and that an allotment thereunder did not convey any title or estate in the fee, and that the fee could not and did not descend to the heirs from the allottee. It was further held in that case that, as by Sec. 6 of the Original Creek Treaty, (Act March 1, 1901, 31 Stat. L. 681), all allotments made to Creek citizens prior to the ratification of that agreement as to which there was no contest, and which did not include public property, were thereby ratified, and that such allotments should in all things be governed by the provisions of that Treaty, that the allotment did not fail, but was ratified, by section 28 of said Original Creek Treaty. It was further held that there was vested in the heirs of such allottee all the right and title the allottee would have received if the allotment had been selected subsequent to the ratification of the Treaty. It was also held that by section 28 of the Original Creek Treaty the law of descents and distributions of the Creek Nation governed the descent of the land, and that the heirs were to be those made such by the Creek law and not by the Arkansas Law. This decision was followed in the case of *Morley v. Fewell*, 122 Pac. 700; *Shellenbarger v. Fewell*, 124 Pac. 617, — Okla. —; and *Reynolds v. Fewell*, 124 Pac. 623, — Okla. —. No arguments are advanced, or authorities cited, which justify a different decision in this matter, even though it were a new question. It cannot be expected that the decisions above stated will be over-turned without strong and cogent reasons therefor.

The next question urged is that, even admitting that the Creek Law of descents and distributions governs, it should be so interpreted

as to exclude persons not members of the Creek tribe from inheriting. This point, also, has been determined adversely to the contention of the defendants in the case of *de Graffenried v. Iowa Land & Trust Co.*, 20 Okla. 687. The decision in that case was followed in *Morley v. Fewell*, 122 Pac. 617, — Okla. —; *Shellenbarger v. Fewell*, 124 Pac. 617, — Okla. —; and in *Reynolds v. Fewell*, 124 Pac. 623, — Pac. —.

It is ably contended by counsel for defendants that this Court, at the time *de Graffenried v. Iowa Land & Trust Co.*, 20 Okla. 687, was decided, did not have before it all the Creek laws and decisions governing descents and distributions. However, it was the duty of this Court to judicially know the Creek law, and the decision in that case has become a rule of property. Not only that, but in the case of *Reynolds v. Fewell*, 124 Pac. 623, — Okla. —; the same

144 counsel, who now appears for defendants in this case, presented the same proposition, and the same statutes of descent and distribution, and the same decisions of the Creek courts, were before this Court as are presented in this case, and it was again held that a person, not a member of a tribe, could inherit lands after they were allotted. It was held, in effect, that after the property lost its tribal character that non-citizens of the Creek Nation could inherit it. These decisions cannot and should not be overruled. Descent of property after it has lost its tribal character should follow the line of natural affection, and there is no reason for presuming that a member of the Creek tribe has not the same affection for his or her white relations as for relations of the Indian blood of the same degree of relationship.

It is next contended by the defendants that the Creek law of descent and distribution cannot be applied to the descent of the allotment in suit here, for the reason that the title had become vested by descent cast on the 29th of June, 1900, and that to change its devolution would be in violation of the fifth amendment to the constitution of the United States, which provides that no person shall be deprived of life, liberty or property without due process of law. This contention has been answered under the first proposition advanced by the defendants.

Agnes Hawes did not own the fee at the time of her death, and the heirs had no right to the land she had selected. The right of the heirs was created by Section 28 of the Original Creek Treaty, and that section also provided by what law the heirship should be determined. The same law that created the right in the heirs provided that the heirs should be determined according to the Creek law. This did not violate the fifth amendment to the constitution or any other constitutional provision.

145 The next contention is that as to the portion of the land constituting the homestead of the deceased, Agnes Hawes, the conveyance was void because the homestead was subject to restrictions at the time of the conveyance.

The Act of Congress approved April 21st, 1904, (33 Stat. L. 204), removed the restrictions from the lands of all allottees not of Indian Blood except homesteads. If it should be found that none of the

land allotted to her heirs was homestead it would not be necessary to consider this assignment further.

In the case of *Mullen v. United States*, 32 S. C. Rep. 494, where the question was as to the alienability of lands allotted in the name of a Choctaw Indian after his death, the Court said:

"In the agreement with the Creek Indians, (Act of March 1, 1901, 31 Stat. L. 861, 870) it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the Commission, and before receiving his allotment, the lands and money to which he would have been entitled if living, should descend to his heirs, 'and be allotted and distributed to them accordingly.' The question arose whether in such cases there should be a designation of a portion of the allotment as a homestead. In an opinion under date of March 16, 1903, the then Assistant Attorney General for the Interior Department, (Mr. Van Devanter), advised the Secretary of the Interior that this was not required by the statute. He said: 'After a careful consideration of the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed, but that where the allotment is made directly to the heirs of a deceased citizen there is no reason or necessity for designating a homestead out of such lands or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule.'"

The Court, in effect, approved this opinion of the Assistant Attorney General, and held that where a member of the Choctaw or Chickasaw Tribe died before selecting his allotment, and the land was allotted in his name after his death, that none of the land
146 was homestead, and that none of the land was subject to restrictions in the hands of the heirs.

The opinion of the Assistant Attorney General was upon the exact question here and is here followed. The land was allotted to the heirs and not to the members who would have been entitled had she lived, and none of it was homestead. It is immaterial that a portion of it was designated as homestead in the patent. The provision with reference to the homesteads was made for the benefit of the allottee, and was not intended to affect allotments made in the name of the heirs after the death of the allottee. The matter of creating a homestead was governed by law, and the persons executing a patent could not, by designating the patented land as homestead, make it homestead, unless the law gave them authority to so designate it.

The last proposition on which defendants rely is that the judgment in the partition suit is a bar to this action. It is urged that the title to the land was in issue in the partition suit and that when the Court sustained a demurrer to the petition in that suit, and rendered judgment for the defendant, there was — an adjudication of the title as prevents the plaintiff from maintaining this action.

It will be observed that the partition suit was brought in equity.

In so bringing the action plaintiff followed a practice almost, if not quite, universal. No case has been found where a partition suit was ever brought on the law side of the docket in the state of Arkansas. The practice in the Indian Territory was to bring such suits on the equity side of the docket.

In the case of *Byers v. Danley*, 27 Ark. 77, decided in 1871, the Supreme Court of the State of Arkansas decided that equity would not take jurisdiction of a partition suit where the land was held adversely to the plaintiff in the partition suit. In *London v. Overby*, 40 Ark. 155, decided in 1882, the same rule was laid down. In *Moore v. Gordon*, 44 Ark. 334, the rule is followed. In the opinion in this case the Court said:

"The proceeding for partition cannot be made a substitute for ejectment to recover an interest in land held partially by others.

In *Crisco v. Hambrick*, 47 Ark. 235, the rule was reiterated that partition could not be maintained against a person in adverse possession. The Court said:

"So far as the record discloses, the lands are held adversely to him; he is excluded from any participation in the rents and profits; and his title is in dispute. He must therefore resort to ejectment, to establish his title, as an action for partition is maintainable only by a party in possession, or whose title is admitted."

The doctrine of these cases was adhered to in *Head v. Philips*, 71 Ark. 423; *Eagle v. Franklin*, 75 S. W. 1093.

It was the rule in the *nisi prius* Courts in the Indian Territory prior to statehood that a suit in equity for partition could not be maintained against persons in adverse possession. The title was not in issue and could not be in issue in the suit for partition brought by the plaintiff, and the trial Court did not err in overruling the plea of *res adjudicata*.

The judgment of the District Court of Muskogee County should be affirmed.

Sep. 17, 1912.

By the COURT: Adopted in Whole.

148 In the Supreme Court of the State of Oklahoma.

No. 1814.

PEGGIE WOODWARD, ANNIE SANDERS, RICHARD WOODWARD, VIOLA Woodward, and Jessie Gaines, Minor, by Richard Woodward, Her Guardian, Plaintiffs in Error,

VS.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Motion by Plaintiffs in Error for Order Opening Judgment and Granting Leave to File Petition for Revivor.

Come the said plaintiffs in error, Peggie Woodward, by her attorney, William R. Lawrence, and the other plaintiffs in error, above

named, by their attorneys, Gibson & Thurman, and state that the plaintiff in error Sammie Woodward, a minor, has died, between the rendition of the judgment below and the judgment of this honorable court of September 19, 1912.

Wherefore, they ask for an order opening the said judgment and granting them leave to file a petition for revivor in favor of the legal representative or heir of said deceased Sammie Woodward.

WILLIAM R. LAWRENCE,
GIBSON & THURMAN,

Attorneys for Plaintiff- in Error.

Service of the above motion accepted this October 2, 1912.

CHARLES A. COOK,

J. C. STONE,

Attorneys for Defendant in Error.

Endorsed on back: No. 1814. Peggie Woodward, et al., Plaintiffs in Error, vs. Robert P. de Graffenried, Defendant in Error. Overruled. Motion by Plaintiffs in error for order opening judgment and granting leave to file petition for revivor. Filed Oct. 3, 1912. W. H. L. Campbell, Clerk. Williams R. Lawrence, and Gibson & Thurman, Muskogee, Oklahoma, Attorneys for Plaintiffs in Error.

149 In the Supreme Court of the State of Oklahoma.

No. 1814.

PEGGY WOODWARD et al.; Plaintiffs in Error,

vs.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Motion of Plaintiff in Error for Leave to Reinstate Motion to Open Judgment to Let in Heirs of Deceased Plaintiff in Error.

Come the plaintiffs in error and ask that the motion to open judgment be reinstated and the following amendment thereto be allowed, that is to say:

The plaintiff in error, Sammy Woodward, died on or about November 20, 1910, while this proceeding was pending in this Honorable Court, upon petition in error, intestate, leaving as his sole heir at law his sister, Viola Woodward, now Viola Brown, one of said plaintiffs in error and now adult, who by reason of such relationship has succeeded to all the rights and title of the land in dispute in this action, which was claimed and owned by said deceased, and for greater certainty reference is here made to the affidavit attached to this amendment, of Richard Woodward, a plaintiff in error herein.

Wherefore, said plaintiffs in error pray that said judgment may be opened for the purpose of reviving the cause in the name of Viola Woodward, the heir of said deceased, and that the said original motion, with the amendment, be taken as and for the petition

for said action so asked for on the part of the Court, or for such other relief as may be proper in the premises.

WILLIAM R. LAWRENCE,
H. A. GIBSON,
Attorneys for Plaintiffs in Error.

Service of the above accepted this Jan. 4 1913.

OWEN & STONE,
Att'ys for Def't in Error.

150 STATE OF OKLAHOMA,
Muskogee County, ss:

I, Richard Woodward, being duly sworn according to law, depose and say that I am one of the plaintiffs in error in the case of Peggie Woodward et al. against Robert P. de Graffenried, defendant in error, No. 1814, now pending in the Supreme Court of Oklahoma, and the same person therein named as Guardian of Sammy Woodward and Viola Woodward, minors. That on or about November 20th, 1910, the said Sammy Woodward, then a minor, died intestate leaving as his sole and only heir at law, his sister, Viola Woodward, also a plaintiff in error herein, who reached her majority September 4th, 1912, and is now married to Harry Brown. That I did not communicate the fact of the death of said Sammy Woodward to said attorneys, namely, William R. Lawrence, N. A. Gibson and H. C. Thurman, until after I was informed of the rendition of the judgment of said Court in said cause and I have no reason for believing that they had any knowledge of the death of said Sammy Woodward until said time, namely, September 19th, 1912.

Further saith not.

RICHARD WOODWARD.

Subscribed and sworn to before me this 30th day of September, 1912.

[SEAL.]

FRED C. LAWRENCE,
Notary Public.

My commission expires Feb. 27th, 1914.

Endorsed on back as follows: In the Supreme Court Okla. No. 1814. Woodward et al., Pl'ffs in error vs. De Graffenried, def't in error. Mo. of pl'ffs in error for leave to reinstate mo. to open judgment to let in heirs of dec. pl'ff in error. Filed Jan. 6 1913. W. H. L. Campbell, Clerk.

151 And thereafter, to-wit: on the 7th day of January 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, December Term, 1912, January 7th, 1913, Fourteenth Judicial Day.

1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,

VS.

ROB'T P. DE GRAFFENRIED, Defendant in Error.

And now on this day it is ordered by the court that the motion of plaintiffs in error for order opening judgment and granting leave to file petition for revivor, be, and the same is hereby overruled.

152 And thereafter, to-wit: on the 7th day of January, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, December Term, 1912, January 7th, 1913, Fourteenth Judicial Day.

1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,

VS.

ROB'T P. DE GRAFFENRIED, Defendant in Error.

And now on this day it is ordered by the court that the motion of plaintiffs in error herein to reinstate motion to open judgment, to let in heirs of deceased plaintiff in error, be, and the same is hereby allowed and judgment is hereby set aside, for revivor.

153 In the Supreme Court of Oklahoma.

No. 1814.

PEGGIE WOODWARD et al., Plaintiff- in Error,

VS.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Petition of Revivor.

To the Honorable the Judges of said Court:

The Plaintiffs in error, by their attorneys of record respectfully represent that, as they are informed and believe their late co-plaintiff in error, Sammie Woodward, departed this life on or about November 20, 1909, intestate, leaving as his sole heir at law the said plaintiff in error, Viola Woodward, now Viola Brown, by reason of her marriage and that she is now of full age,

That said Plaintiff in Error, Richard Woodward, was duly appointed as administrator of the estate of said deceased, as will appear by a certified copy of letters of administration hereto attached as part of this petition, marked "A" and that he has fully settled the said estate and has been discharged as such administrator as will more fully appear by certified copy of the order of court discharging him, hereto attached, made part of the petition and marked "B";

And they further represent that, as the fact will appear from the case-made in this honorable court, by the proceedings in the court below, to revive this action in favor of the heirs of Lewis Woodward; one of the original defendants in this action that Viola Woodward, née Brown, was a sister of said Sammie Woodward, to which reference is made to page — of said case-made and also to affidavit of said Richard Woodward, hereto attached and made part hereof marked as "C" as proof that said Viola is now the sole heir at law and representative as successor of said deceased plaintiff in error, which documents and record are offered in support of the allegation of this petition.

Wherefore, plaintiff-in error prays that this action be revived in favor of said Viola Woodward, plaintiff, as to the interest, title and rights herein of said Sammie Woodward, deceased, and that their petition in error herein be disposed of as may be deemed by your honors agreeably to law and justice.

WILLIAM R. LAWRENCE,
Att'y for Peggie Woodward, Plaintiff in Error.
H. A. GIBSON,
Attorney for Other Pl's in Error.

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In Supreme Court, State of Oklahoma.

No. 1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,

vs.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Affidavit of Richard Woodward.

STATE OF OKLAHOMA,

Muskogee County, ss:

I, Richard Woodward, being duly sworn according to law, depose and say that I am the identical Richard Woodward who was late the administrator of the estate of Sammie Woodward, deceased, one of the plaintiffs in error of the above named case and that I have settled said estate and that there are no debts of said deceased remaining unpaid, that he left as his sole and only heir at law his sister, Viola, now, Viola Brown and one of said plaintiffs in error, and that she is an adult, in possession of all the real estate of which said Sammie died seized, and is claiming the same as owner in fee as heir aforesaid. Further saith not.

RICHARD WOODWARD.

Subscribed and sworn to before me by said Richard Woodward
this January 15, 1913.

[SEAL.]

C. A. GILLAM,
Notary Public.

My Com. Exp's Feb. 7, 1913.

155

Letters of Administration.

STATE OF OKLAHOMA,
Muskogee County:

In the County Court.

No. 962.

In the Matter of the Estate of SAMMIE WOODWARD, Deceased.

Richard Woodward is hereby appointed administrator of the
estate of Sammie Woodward, Deceased.

Witness: W. C. Jackson, Judge of the County Court of Muskogee
County, State of Oklahoma, with the seal thereof affixed, the 27th
day of April, 1910.

WM. F. WELLS,
Clerk of County Court.

STATE OF OKLAHOMA,
Muskogee County, ss:

I, Richard Woodward, do solemnly swear that I will perform ac-
cording to law, the duties of administrator of the estate of Sammie
Woodward, deceased. So help me God.

Subscribed and sworn to before me this 28th day of April, 1910.

WM. F. WELLS,
Clerk County Court.

STATE OF OKLAHOMA,
County of Muskogee, ss:

I, G. H. Shaffer, Clerk of the County Court within and for the
County of Muskogee, State of Oklahoma, hereby certify that the
above and foregoing is a true and correct copy of the Letters of Ad-
ministration issued in this matter, as the same appears from the
records of my office.

In witness whereof, I hereunto set my hand and affix the official
seal of this Court at Muskogee, Oklahoma, this 15th day of January,
1913.

[SEAL.]

C. H. SHAFFER,
Clerk of the County Court.

[Endorsed:] Letters of administration granted to — — —, ad-
ministrator. Muskogee Printing Co., Muskogee, Okla.

156 Record County Court, Muskogee County, Oklahoma, Tuesday, January 9, 1912, Continued.

Final Discharge.

STATE OF OKLAHOMA,
 Muskogee County, ss:

In the Probate Court of said County.

No. 962, State.

In the Matter of the Estate of SAMUEL WOODWARD, Deceased.

— of Creekola, Muskogee County, Ok., — deceased, having this day duly presented to the Court satisfactory vouchers showing that he has performed all the acts lawfully required of — under decree of distribution herein bearing date of 29th day of Nov. 1911; and that no further acts remain to be performed by him.

Now, on motion of counsel for said Richard Woodward, administrator, it is ordered, adjudged and decreed, that said Richard Woodward administrator, has fully and faithfully discharged the duties of his trust; that he — hereby wholly and absolutely discharged from all further duties and responsibilities as such administrator, and that letters of administration are hereby vacated; that the said estate is declared fully distributed, and the trust settled and closed; and the Southern Surety Company sureties are hereby released from any liabilities to be hereafter incurred.

Done in open Court this 9th day of January, 1912.

THOS. W. LEAHY,
Judge of the Probate Court.

(Recorded Com. Record 18, Page 511.)

Hereupon Court adjourned subject to call.

STATE OF OKLAHOMA,
 County of Muskogee, ss:

I, C. H. Shaffer, Clerk of the County Court within and for the County of Muskogee, State of Oklahoma, hereby certify that the above and foregoing is a true and correct copy of the Order made in this matter, as the same appears from the records of my office.

In Witness Whereof, I hereunto set my hand and affix the official seal of this Court, at Muskogee, Oklahoma this 15th day of January, 1913.

[SEAL.]

C. H. SHAFFER,
Clerk of the County Court.

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In the Supreme Court, Oklahoma.

No. 1814.

PEGGIE WOODWARD et al., Plaintiff- in Error,

vs.

ROBERT P. DE GRAFFENRIED, Defendant in Error.

Notice to Def't in Error of Petition to Revive, &c.

To said defendant in error or his attorneys of record:

Take notice that foregoing attached petition of plaintiffs in error to revive the above named action in the name of Viola Woodward one of said plaintiffs, as the sole heir at law and successor in interest and title of the late plaintiff in error, Sammie Woodward, deceased, will be filed and presented for hearing in said Supreme Court at such time as may be fixed by said Court.

PEGGIE WOODWARD,

Pl'ff in Error,

By WILLIAM R. LAWRENCE,

Her Att'y.

Service of above notice, with petition attached, acknowledged, and copy of same received at Muskogee, Oklahoma, January 30, 1913.

CHARLES A. COOK,

Att'y for Def't in Error.

Endorsed on back: No. 1814. Peggie Woodward, et al., Pl'ffs in Error, vs. Robert P. de Graffenried, Def't in Error. Petition of Revivor of Pl'ffs. Filed Jan. 31, 1913. W. H. L. Campbell, Clerk. N. A. Gibson, Wm. R. Lawrence, Att'y- at law, rooms 308-309 Iowa Building, Muskogee, Okla., Att'ys for Pl'ffs in Error.

158 And thereafter, to-wit: on the 11th day of February, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, December Term, 1912, February 11th, 1913,
Twenty-first Judicial Day.

1814.

PEGGIE WOODWARD et al., Plaintiffs in Error,

vs.

R. P. DE GRAFFENRIED, Defendant in Error.

And now on this day the above cause comes on for hearing before the court upon the petition of plaintiffs in error herein, to revive the above action in favor of Viola Woodward, plaintiff, as to the in-

terest, title and rights herein of Sammie Woodward, deceased, and that their petition in error herein be disposed of as may be deemed proper by the court, and the court having considered said petition, finds that the same should be allowed, and the above action is hereby accordingly revived, as to the interest, title and rights of Sammie Woodward, deceased, in favor of Viola Woodward.

159 In the Supreme Court of the State of Oklahoma.

Certificate.

SUPREME COURT, STATE OF OKLAHOMA, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 158 pages, numbered from 1 to 158, both inclusive are a full, true and complete transcript of the record and all proceedings in cause No. 1814, Peggy Woodward et al., Plaintiffs in error, vs. Robert P. de Graffenried, Defendant in error, as the same remain on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Court, at Oklahoma City, this 19th day of April, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By JESSIE PARDOE, Deputy.

Endorsed on cover: File No. 23,669. Oklahoma Supreme Court. Term No. 164. Peggie Woodward, Richard Woodward, Viola Woodward, et al., plaintiffs in error, vs. Robert P. De Graffenried. Filed May 3d, 1913. File No. 23,669.

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In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1914.

No. 164.

**PEGGIE WOODWARD, RICHARD WOODWARD,
VIOLA WOODWARD, et al., *Plaintiffs in Error,***

vs.

ROBERT P. de GRAFFENRIED, *Defendant in Error.*

SUBSTITUTED BRIEF *for* PLAINTIFFS *in* ERROR.

May It Please the Court:

This is an ejectment suit filed in the District Court of Muskogee County, Oklahoma, by the defendant in error on March 25, 1908, to recover an undivided one-half interest in the one-hundred-and-sixty-acre allotment set apart and allotted to Agnes Hawes, a duly enrolled Creek Freedwoman, who, after receiving her allotment, died in June, 1900, leaving surviving her, Ratus Hawes, the husband, and Peggie Woodward, the mother, one of the plaintiffs in error; and also leaving the other plaintiffs in

error as brothers and sisters, etc. We shall refer to the parties as plaintiff and defendants, that being their position in the lower court, but in this court, plaintiff below is defendant in error.

The plaintiff, de Graffenried, did not in his ejectment petition undertake to deraign his title. He simply claims to be the owner of an undivided one-half interest and alleges that the defendants are tenants in common with him. The defendants filed an answer, being in substance a general denial, and also set up as a special defense a plea of *res adjudicata*, particularly set forth in the record, pages 20 to 22, with the exhibits showing the commencement of a former suit by the plaintiff to recover the same land and establish his alleged one-half interest, which former suit had been dismissed by the United States Court, and defendants claim that the dismissal of said case on demurrer foreclosed the question and barred plaintiff from prosecuting a new suit to recover the land, especially in view of the fact that plaintiff's claim at all times to an interest in the land was based on the same claim of title. In the cases instituted by the plaintiff he claimed title under a deed executed to him by one Ratus Hawes, the surviving husband of the deceased allottee.

After the pleadings were made up the parties, through their counsel, signed an agreed statement of facts covering some of the issues of fact in the case, which agreed statement is as follows:

Agreed Statement of Facts.

It is agreed by and between the parties hereto that the above entitled cause shall be submitted to the court for trial upon the following agreed statement of facts, to-wit:

"First. That Agnes Hawes was a citizen of the Creek Nation, enrolled and recognized as such, and that she was not of Indian blood, being a negro of full blood, and enrolled on the freedman roll of the Creek Nation.

"Second. That the said Agnes Hawes died in the Creek Nation on the 29th day of June, 1900.

"Third. That the said Agnes Hawes before her death made selection of her allotment of land, as such citizen, in the Creek Nation before the Commission to the Five Civilized Tribes, and received a certificate of allotment therefor from the said Commission, which land is described as follows:

Being the southeast quarter of section 33, township 15 north, range 18 east, in the Creek Nation of the Indian Territory.

"Fourth. That after her death, and after the adoption of the Creek Treaty of Agreement between the United States and the Creek Tribe of Indians on the 25th day of May, 1901, the said Commission to the Five Civilized Tribes awarded said land to the heirs of Agnes Hawes, and thereafter on the 1st day of April, 1904, a patent was duly issued to the heirs of Agnes Hawes, without naming them, which patent was in due form and duly approved by the Secretary of the Interior, which land awarded to her heirs by said Commission was the same land

selected by Agnes Hawes before her death, and for which she had received certificate of allotment.

"Fifth. That at the death of the said Agnes Hawes she was the legal and acknowledged wife of Ratus Hawes, the said Ratus Hawes and the said Agnes Hawes having been married under a license issued by the United States authorities.

"Sixth. That the said Agnes Hawes left no children or grand children surviving her and had no children by her said husband Ratus Hawes, and that she left surviving her the defendant Louis Woodward, her father, and the defendant Peggy Woodward, her mother; that she also left surviving her, her husband Ratus Hawes, who is still living.

"Seventh. That the said Ratus Hawes is not, and never was a citizen of the Creek Nation.

"Eighth. That the said Agnes Hawes came to her death by a gun-shot wound inflicted by her said husband, Ratus Hawes, and that the said Ratus Hawes was afterwards tried in the United States Court at Muskogee on the charge of murdering his wife, and was convicted of manslaughter, and served a term in the penitentiary on said charge. That said Ratus Hawes on the 22nd day of June, 1904, executed to plaintiff a warranty deed to an undivided one-half interest in and to the above described quarter section of land, being the allotment selected by the said Agnes Hawes, deceased, which said deed was duly and regularly acknowledged before a proper officer, and recorded as required by law in the deed records at Muskogee.

"*Ninth.* That the patent as aforesaid, to the heirs of Agnes Hawes, was accepted by the heirs of Agnes Hawes after the same had been duly recorded by the proper authorities in the proper records.

"*Tenth.* Each and all of the parties here-to reserve the right to offer in evidence before the court any law of the Creek Nation, whether statutory or decisions of the Creek Courts, relative to descent and distribution of property under the Creek laws applicable to this case.

Dated this April 6, 1908.

CHARLES A. COOK,
Attorney for Plaintiff.
MOMYER & SHARP,
Attorneys for Defendants."

On the trial some evidence was offered, but not to vary or contradict the agreed statement.

The surviving husband shot and killed his wife, the allottee, on or about the 29th day of June, 1900, for which he served a term in the penitentiary on conviction for manslaughter.

He executed to the plaintiff a deed to an undivided one-half interest in his wife's allotment on the 22nd day of June, 1904.

There was no child born to Ratus and Agnes Hawes, and the questions in this case are:

First. Whether or not the surviving husband can claim as an heir, it appearing that he criminally

shot and killed his wife, for which he served a term in the penitentiary.

Second. What law of descent controls the inheritance, it being contended by the defendants below, plaintiffs in error here, that the Arkansas law of descent controlled the devolution of the allotment, and that the husband under the Arkansas law was not an heir and acquired no interest in the land, not even curtesy, there being no child born. Further, that if the Creek law of descent controlled the devolution, then the husband, as a non-citizen of the Creek Nation, was not an heir, but this latter question has been adversely decided by this court, and will not be further considered.

Third. Whether or not the plaintiff is foreclosed by the plea of *res adjudicata*.

The Oklahoma Supreme Court, on appeal, affirmed the judgment of the lower court in plaintiff's favor, the Supreme Court holding that the Creek law of descent controlled the devolution of the allotment; that under the Creek law the surviving husband inherited an undivided one-half interest; that the plea of *res adjudicata* was not well taken, and that the husband was not excluded from sharing as an heir, although he had killed his wife.

The plaintiffs in error in due time obtained a writ of error from this court and filed the following assignments of error:

*"In the Supreme Court of the United States.
Peggie Woodward, Richard Woodward, Viola Woodward, Annie Sanders, and Jessie Gaines, Minor, by Richard Woodward, Her Legal Guardian, Plaintiffs in Error, v. Robert P. de Graffenried, Defendant in Error.
No.*

ASSIGNMENT OF ERROR ON WRIT OF ERROR TO
SUPREME COURT OF OKLAHOMA.

"The plaintiffs in error in the above named cause aver and show that in the judgment and proceedings of said cause, the Supreme Court of the State of Oklahoma erred to the grievous injury and wrong of said plaintiffs in error, in the following particulars, to-wit:

"(1) In holding and adjudging that under the evidence, agreed statement of facts, pleadings and laws of the United States relating to the allotment and disposition of the lands of the Muscogee, or Creek Tribe of Indians, and the descent and disposition of such lands after the death of an allottee of such lands, intestate, and without children or descendants of children surviving, and whose nearest relation of Creek citizenship being her mother, the said plaintiff, Peggie Woodward, and whose husband surviving, was a non-citizen of said Creek Nation; that said defendant in error had established title in fee simple to an undivided half of 160 acres of land, the subject matter of this action, under a deed of conveyance from the surviving husband of said allottee, who is a non-citizen of said tribe of Indians, and the right thereunder to a joint possession as tenant in common with said Peggie Woodward of said land, contrary to an Act of Congress approved March 1, 1901, en-

titled 'an act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians, and for other purposes,' whereby said plaintiff in error, Peggie Woodward, was deprived of the title and right of possession, to an undivided one-half of said land, as she should have had and did have under said laws of the United States.

"(2) The Supreme Court of Oklahoma erred in holding that the said plaintiff in error, Peggie Woodward, as a citizen of said Creek Nation of Indians, and nearest of kin of Creek blood, and citizenship to said allottee, as shown by the agreed statement of facts in said case, and the Creek law of descent, adopted by said last named Act of Congress, namely, the Act of March 1, 1901, entitled 'an act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians and for other purposes,' whereby said Peggie Woodward was deprived of her title and right of possession to an undivided one-half of said tract of land, as heir at law of the said allottee, under said Creek law of descent and distribution as adopted by said Act of Congress, which judgment and holding was contrary to the laws of the United States, aforesaid.

"(3) The Supreme Court of the State of Oklahoma, erred in holding and adjudging in this cause, under the agreed statement of facts, evidence, and laws of the United States, and especially under said Act of Congress, approved March 1, 1901, entitled 'an act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians and for other purposes,' notwithstanding the conceded facts that the land in controversy in this action was formerly a

part of the public domain of the Creek Nation of Indians, and by the enrollment of Agnes Hawes, formerly Agnes Woodward, as a citizen of said nation, she became and was entitled to have a- receive an allotment of 160 acres of land out of said public domain, as she might select or have selected, as provided by an Act of Congress adopted June 28, 1898, and that thereunder she did select as and for her allotment the said 160 acres of land, the sole subject matter of this action, prior to her death, which was on the 29th day of June, 1900, and that afterward a patent therefor was issued to the heirs of said allottee, without other description, April 1, 1904; that said allottee died intestate, without child or children, or descendants thereof, leaving a husband, Ratus Hawes, and her mother, said Peggie Woodward, plaintiff in error, an enrolled citizen of said Creek Nation of Indians, and her nearest relation of Creek citizenship, and her father, Lewis Woodward, a non-citizen of said nation of Indians, now deceased, and the other co-plaintiffs in error as her nearest of kin; and notwithstanding the law of descent of the Creek Nation, as shown by the record in this case, and as interpreted and construed by the Act of Congress of June 30, 1902, entitled 'an act to ratify and confirm a supplemental agreement of the Creek Tribe of Indians and for other purposes,' providing for the descent of the lands of the Creek Nation and the tribal funds thereof should descend in the line of the Creek blood and Creek citizenship, the said Supreme Court of the State of Oklahoma adjudged that one-half of said allotment of said Agnes Hawes descended to said Ratus Hawes, non-citizen hus-

band of said deceased allottee and the other half to her mother, Peggie Woodward, plaintiff in error, the said defendant in error, Robert P. de Graffenried, being the grantee of said Ratus Hawes under a deed of warranty of June 22, 1904, wherefore this plaintiff in error, Peggie Woodward, contrary to the facts and the law and especially the said Acts of Congress and laws of descent of said Creek Nation of Indians adopted by said Act of Congress of March 1, 1901, became and was deprived of an undivided one-half of said tract of 160 acres.

“(4). The said Supreme Court of Oklahoma erred in holding and adjudging that so much of the answer of said plaintiff in error, Peggie Woodward, as affirmatively alleged a defense to the said action of defendant in error was not a defense thereto though alleged that the same had been forever barred by a former recovery in an action brought by said defendant in error (then plaintiff) against this plaintiff in error (then defendant) and her co-defendant and husband, Lewis Woodward, since deceased, and also co-defendant in this action, which has been revived in favor of his heirs, the other co-plaintiffs in error herein, as appears from the records of this cause, although she says therein, June 2, 1904, this defendant in error brought his action in the United States Court for the Western District of Indian Territory, against said Peggie Woodward and her husband, Lewis, and after his death revived in favor of his heirs, as aforesaid, for the partition of the said land, and none other, between him and said defendants therein, alleging and claiming to be a tenant in common in fee and entitled to joint possession with them of an un-

divided one-half of the same, under and by virtue of a warranty deed of conveyance executed to him therefor by one Ratus Hawes, husband of the allottee, Agnes Hawes, a citizen of the Creek Tribe of Indians, who died intestate leaving no child, children or descendants thereof, and her father, said Lewis Woodward, and her mother, said Peggie Woodward; and that the wife of said grantor had selected and received her said allotment but died intestate June 29, 1900, before receiving her patent therefor, which was afterward, April 4, 1904, executed to her heirs, without other description; and further therein alleged as ground for title in said grantor, Ratus Hawes, that said Act of Congress of March 1, 1901, provided that the allotments of deceased citizens of said nation should descend according to the law of descent of the Creek Nation, and which was set forth in said complaint as follows:

‘The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of his estate if there are no children, and a child’s part if there should be children, in all cases where there is no will. The husband surviving shall inherit in like manner.’

‘It was further alleged in said complaint that the defendants do deny his title, refuse to partition, are now in actual possession receiving rents and profits, and deny him the same or any part thereof, and pray for judgment of partition. Demurrer sustained, plaintiff stood by his complaint and judgment of the court: ‘Complaint be and is dismissed for want of equity,’ September 3, 1906, and so remains the record of said United States Court, and so

proved to the Trial Court, and so appeared in its record in the Supreme Court of Oklahoma, that the same was not a bar or sufficient defense to this defendant's cause of action, and judgment was rendered accordingly in favor of defendant in error, declaring him the owner in fee as tenant in common with said plaintiff, Peggie Woodward, and entitled to have, hold and enjoy with her the joint possession of said 160-acre tract of land.

"(5) The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the trial court and remanding the cause to said court directing a judgment for these plaintiffs in error for costs by them expended and incurred therein.

"Wherefore, for these and other manifest errors appearing in the record, the said plaintiffs in error pray that said judgment of the said Supreme Court of Oklahoma be reversed, set aside and held for naught, and that a judgment be directed to be entered for these plaintiffs in error for their costs.

PEGGIE WOODWARD,
Plaintiff in Error,
By WILLIAM R. LAWRENCE,
Her Att'y.

RICHARD WOODWARD,
VIOLA WOODWARD,
ANNIE SANDERS,
JESSIE GAINES, *Minor,*
By RICHARD WOODWARD,
Her Legal Guardian.

The Other Plaintiffs in Error,
By WM. M. CRAVENS,

(See Rec., pp. 4 to 7.) *Their Attorney."*

First Point.

Ratus Hawes, the husband, having criminally killed his wife, is barred from profiting by her death, and was excluded by his act from sharing in her estate as an heir thereof.

And these plaintiffs in error say that it was error on the part of said Supreme Court of Oklahoma to omit the consideration of said fact and holding and deciding that said act of said husband was a bar to his inheritance of any property or right from his said wife, and because of said error plaintiffs in error were grievously injured and deprived of the land in question in this case, and they ask for the judgment of this honorable court to reverse and set aside the judgments of the lower courts or for such other and different judgment as may to your honors seem meet and proper.

As ground for such request they say that no one should be permitted to profit by such felonious and unlawful act of manslaughter, thereby voluntarily and wilfully making himself an heir of his deceased wife and successor to her property.

The nearest case in point which we have found decided by this honorable court is *The New York Mutual Life Insurance Co. v. Armstrong's Adm'r*, 117 U. S. 591, in which one Armstrong was insured on the endowment plan, payable on a day named, or, if then deceased, payable to his legal representa-

tives. Shortly after this insurance had been obtained Armstrong was murdered. The company refused to pay on the policy and was sued, and it set up, as a special defense, that the insurance had been procured by one Hunter with intent to cheat and defraud it by his murder of the assured. Under this plea it offered evidence to prove that Hunter had procured the policy in his favor on the life of said Armstrong, and that he murdered him to get the money on the policy; that he was tried and convicted of the crime of murder and executed. This offer of proof was rejected by the court and the case was brought to this court on error and reversed.

The closing paragraph of this court's opinion is as follows:

“But independently of any proof of the motives of Hunter in obtaining the policy, and in assuming that they were just and proper, he forfeited all rights under it, when to secure its immediate payment he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired.”

Similar language would apply to the case on hearing, which is more heinous, if possible, than the case cited, in that the allottee was killed the day after she had selected her allotment of land out of the Creek public domain, and at once became en-

titled to its use and enjoyment, but by the infamous act of her husband she became deprived of both land and life, and thereby he attempts to become successor to a moiety of it, against the peace and dignity of the United States and against its special protection of the allottee as her guardian. See 84 Am. St. Rep. 323.

The Question.

The issue is whether or not Agnes Hawes, the allottee, at the date of her death on June 29th, 1900, died seized and possessed of an equitable estate of inheritance in the land in controversy, the land having been allotted to her by the Dawes Commission under the Act of Congress of June 28th, 1898, commonly known as the Original Curtis Bill (30 Stat. L. 495), and whether the law of descent in force at the date of her death controlled the devolution of the allotment.

It is our contention that the Arkansas law of descent was in force at the date of the death of Agnes Hawes, and this will not be seriously denied, but it is the contention of the defendant in error, and so decided by the court below, that Curtis Bill allottees acquired nothing by virtue of the allotment further than a mere life estate in the surface. The court below held that Agnes Hawes acquired no estate in the land by virtue of the allotment thereof to her by the Commission; that she merely had the

right to the use and occupancy for life; that on her death the allotment lapsed and reverted to the tribe and became public domain; that under the provisions of the Original Creek Agreement approved by Act of Congress of March 1st, 1901 (31 Stat. L. 861) section 28 thereof, the land in question was allotted to the heirs of Agnes Hawes; that the heirs of Agnes Hawes were first takers under section 28 of the said Original Creek Agreement, and that in accordance with section 28 the Creek law of descent and distribution named the heirs and provided for their shares and portions. This calls for consideration and construction of the Curtis Bill of 1898 and the Original Creek Agreement of 1901.

The Commission to the Five Civilized Tribes opened the Land Office in Muskogee, Indian Territory, on April 1st, 1899, and began the allotment of lands in the Creek Nation under the Curtis Bill of June 28th, 1898. The Land Office in the Creek Nation was the first Land Office opened in any of the Tribes. *The only allotments made under the Curtis Bill were made in the Creek Nation.*

There were no allotments made in the Choctaw and Chickasaw Nations, either under the Original Curtis Bill or the Atoka Agreement.

The Land Offices in the Choctaw and Chickasaw Nations were not opened for the selection of allotments until the 15th day of April, 1903, nearly one year after the ratification of the Supplemental

Choctaw-Chickasaw Agreement. [See Tenth Annual Report of the Dawes Commission (1903), page 51.]

The Land Office in the Seminole Nation was not opened until June 1st, 1902, more than three years after the agreement with the Seminoles had been ratified. [See Eighth Annual Report of the Dawes Commission (1901) page 32.]

The Land Office in the Cherokee Nation was not opened for the selection of allotments until January 1st, 1903. [See Dawes Commission's Tenth Annual Report (1903) page 41.]

Whereas, the Land Office in the Creek Nation was opened on April 1st, 1899. [See Dawes Commission's Sixth Annual Report (1899) page 18.]

Section 11 of the Curtis Bill, under which the allotment was made to Agnes Hawes, is as follows:

"Sec. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed, as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under Acts of Congress, and known as the 'Dawes Commission,' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of same; but all oil, coal, asphalt and mineral deposits in the lands of any tribe

*are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt or mineral deposits; and all townsites shall also be reserved to the several tribes, and shall be set apart by the Commission heretofore mentioned as incapable of allotment. There shall also be reserved from allotment a sufficient amount of lands now occupied by churches, schools, parsonages, charitable institutions, and other public buildings for their present actual and necessary use, and no more, not to exceed five acres for each school and one acre for each church and each parsonage, and for such new schools as may be needed; also sufficient land for burial grounds where necessary. When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval: *Provided*, that nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted by Act of Congress, nor be so construed as to confer any additional rights upon any parties claiming under any such Act of Congress: *Provided further*, that whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home if the holder so desires: *Provided further*, that if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the courts of the United States in or for the aforesaid territory to have been illegally accorded rights of citizenship, and for that or any other reason declared to be not entitled to any allotment, he shall be ousted and ejected from said lands; that all per-*

sons known as intruders who have been paid for their improvements under existing laws and have not surrendered possession thereof who may be found under the provisions of this act to be entitled to citizenship shall, within ninety days thereafter, refund the amount so paid them with six per centum interest, to the tribe entitled thereto; and upon their failure so to do said amount shall become a lien upon all improvements owned by such person in such territory, and may be enforced by such tribes; and unless such person makes such restitution no *allotments* shall be made to him: *Provided further, that the lands allotted shall be non-transferable until after full title is acquired and shall be liable for no obligations contracted prior thereto by the allottee, and shall be non-taxable while so held: Provided further, that all towns and cities heretofore incorporated or incorporated under the provisions of this act are hereby authorized to secure, by condemnation or otherwise, all the lands actually necessary for public improvements, regardless of tribal lines; and when the same can not be secured otherwise than by condemnation, then the same may be acquired as provided in sections nine hundred and seven and nine hundred and twelve, inclusive, of Mansfield's Digest of the Statutes of Arkansas.*" (Statutes at Large Vol. 30, p. 495.)

Section 6 of the Original Creek Agreement (31 Stat. L. 861) is as follows:

"All allotments made to Creek citizens by said Commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are

not herein otherwise affected, are confirmed, and the same shall, as to appraisalment *and all things else* be governed by the provisions of this agreement; and said Commission shall *continue* the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said Commission."

And, section 28, of the Original Creek Agreement (31 Stat. L. 861) is as follows:

"No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"All children born to citizens so entitled to

enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made and to no other persons.”

It is our contention that Curtis Bill allottees acquired an estate of inheritance in the land allotted, the minerals being reserved to the tribe, and that on the death of the allottee, her heirs inherited all the title of the allottee, and that the Arkansas Law of descent was in force at that time, and under that law the surviving husband obtained no interest.

History of the Curtis Bill and Work of the Dawes Commission Thereunder.

The allotment of Agnes Hawes having been made under the provisions of the “*Curtis Bill*” approved June 28, 1898 (30 Stat. L. 495), it is highly important to first ascertain the conditions then existing and the object Congress sought to attain by its enactment, as preliminary to a full understand-

ing of its force and meaning. The events of that day are officially set forth in the Annual Reports of the Dawes Commission, and as a precedent for referring to said reports we cite the opinions of the United States Supreme Court in *Goat v. U. S.*, 224 U. S. 458, *Choate v. Trapp*, 224 U. S. 665, and *New York Indians v. U. S.*, 170 U. S. 1.

As pointed out by this court in *McKee v. Henry*, 201 Fed. 74, the lands of the Creek Nation situated in the Indian Territory were held by the Creeks as a tribe in fee simple so long as they should exist as a nation and continue to occupy the land, their title resting upon letters patent, issued to the Creek Nation on the 11th day of August, 1852, in virtue of the 14th article of the Treaty of March 24, 1832 (7 Stat. L. 366), the 3rd article of the Treaty of February 14, 1833 (7 Stat. L. 417), and the 3rd article of the Treaty of August 7, 1836 (7 Stat. L. 699).

Congress, by an act approved March 3, 1893 (27 St. L. 645), section 15 thereof, gave the consent of the United States

“to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotment the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States.”

In this section 15 Congress expressly declared that

“upon the allotment of lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.”

Section 16 of this act authorized the President to appoint, with consent of the Senate, three Commissioners, to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Creek Nation and the Seminole Nation,

“for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same, or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within the said Indian Territory.”

This Commission, commonly known as the Dawes Commission, was authorized to negotiate with said tribes under rules and regulations prescribed by the President through the Secretary of

the Interior. The Commission entered upon these duties forthwith. On April 23rd, 1897, the Commission negotiated an agreement with the Choctaw and Chickasaw Nations which was ratified by Congress in an amended form by an act approved June 28th, 1898 (30 Stat. L. 495), commonly known as the original Curtis Bill. This agreement is known as the Atoka Agreement, and was to become effective, if ratified by a majority of the voters of the Choctaw and Chickasaw tribes at an election to be held prior to December 1st, 1898. An election was held on August 28th, 1898, resulting in a ratification by the tribe. (Sixth Annual Report of Dawes Commission for the fiscal year ending June 30th, 1899, page 9.)

Likewise, the Commission negotiated an agreement with the Creeks on September 27th, 1897, to become effective, if ratified by a majority of the voters at an election to be held prior to December 1st, 1898. In the Sixth Annual Report of the Commission, for the fiscal year ending June 30th, 1899, page 9, the Commission says:

“Chief Isparhecher of the Creeks was slow to call an election, and it was not until November 1, 1898, that the agreement with that tribe was submitted in its amended form for ratification. While no active interest was manifested, the full-bloods and many of the freedmen were opposed to the agreement and it failed of ratification by about one hundred and fifty votes. As a result the Act of June 28, 1898, known as the Curtis Act, *became effective in that nation*” (meaning the Creek nation.)

On December 16th, 1897, the Commission negotiated an agreement with the Seminoles which was ratified by the tribe, and also by Congress by an act approved July 1, 1898 (30 Stat. L. 567). So thus when the Curtis Bill went into effect it operated only in Creek and Cherokee Nations, the other three having made special agreements.

The Commission in its Fifth Annual Report, for 1898, page 4, in discussing these various agreements refers to the one of September 27, 1897, with the Creeks, and says:

“The agreement with the Creeks was rejected by the council, the chief, Isparhecher, some of his friends and other persons interested in leases obtained from the nation, opposing the changes contemplated in it.”

The agreement of September 27, 1897, with the Creeks was ratified by Congress, the same being found in section 30 of the Curtis Bill approved June 28, 1898 (30 Stat. L. 495). Congress, however, made some amendments to the agreement and provided that it should not become operative unless ratified and confirmed by the tribe before December 1, 1898,

“by a majority of the votes cast by the members of said tribe at an election to be held for that purpose.”

The Commission, in its Fifth Annual Report (1898), in discussing the results of its labors, and stating the condition of affairs, beginning on page 5, says:

“In the meantime, in contemplation of the condition in which the Territory would be left by the possible failure to ratify pending agreements, Mr. Curtis, of the Indian committee of the House, addressed himself to the preparation of a bill, the general design of which would be to transfer the control of the property rights in these nations from tribal authority to that of the United States, much the same as their political government had been transferred by the act which was to take effect January 1, 1898. The result of this undertaking of Mr. Curtis, on which he bestowed much time and exhaustive labor, availing himself of the assistance of others which he could command, has been the act entitled ‘An act for the protection of the people of the Indian Territory, and for other purposes,’ known as the ‘Curtis Bill.’ The knowledge of the preparation of this bill aroused great opposition of those in the Territory opposed to any change in the exclusive use of tribal property by the few controlling the government of the Territory. Accordingly large delegations were sent to Washington, at great expense to their national treasuries, for the purpose of preventing such legislation and procuring, if possible, the repeal of the law taking away so much of their political power, which was to take effect January 1, 1898. It was deemed necessary, therefore, to require the presence of the Commission in Washington during the pendency of such legislation to give information to the committees having it in charge as to the real condition of the Territory and the needs and character of the legislation proposed. At the request of these committees, and with the approval of the Department, the Commission

remained in Washington until final action upon this bill, rendering such assistance as was in its power to the several committees, based upon accurate and reliable information in relation to the many questions involved in the comprehensive scope of the proposed measure, as well as upon their experience and observation while in the Territory. After many changes and modifications, it is believed to have taken the best final shape possible under the circumstances.

"Immediately upon the final passage of this bill the Commission returned to the Territory to the discharge of the new duties required of it, in connection with those that had heretofore been imposed. In this work the Commission is still engaged.

"The Curtis bill is designed, in place of the present exclusive holding and use by a few under existing tribal governments prostituted to the perpetuation of such uses, to substitute a new code of United States law for the Territory. *It changes these communal holdings from this exclusive use into individual holdings under United States control.* It necessarily involved in its preparation very many provisions, some of them of an exceedingly complicated character. It is too much to expect that on its application the modification of some features of so comprehensive a measure may not be found necessary, but its purpose is wise, and so far as can be foreseen its provisions are *adequate*. The Curtis Bill provided, in addition to its general enactments, for the re-submission, with certain specified modifications of the two agreements—that with the Choctaws and Chickasaws and that with the Creeks—for ratification, to a popular vote in their respective nations, and pro-

vided further that if ratified the provisions of these agreements, so far as they differed from that bill, should supersede it. The Choctaw and Chickasaw agreement was accordingly so submitted for ratification on the 24th of August, 1898, and was ratified by a large majority.

“Chief Isparhecher has so far failed to call an election, as he was authorized and directed to do by provision of the Curtis Bill, but it is believed that if such an election were held it would result in the ratification of the agreement with the Creeks. *Therefore, in many of the more difficult details of allotment and other features of that law it will hereafter be enforced only in the Cherokee and Creek Nations.*

* * * * * *

“It is apparent that the proper discharge of these new duties will require of the Commission much labor and great care. They are of such a character as will not permit of the calling in of much assistance of other persons. Personal attention and the exercise of their personal judgment are required at almost every step in it. Much time will necessarily be consumed in the proper discharge of these duties. *Yet they must all be completed in each of the nations before any steps toward allotment can be taken in that nation.* And upon the care and accuracy with which this preliminary work is done will depend the justice and value of all final allotments.

“The Commission has been engaged since its return to the Territory in the work of taking a census of the Seminole, Creek and Chickasaw tribes in conformity with the present law. The Commission has very nearly completed a census of the Creek and Chickasaw Indians and

freedmen and has fully completed that of the Seminoles, and rolls of the latter are about completed, so that the Commission may at any time, when provided with means, begin the work of allotment according to the provisions of the agreement; but in order to do this work an appropriation of at least \$50,000 is believed to be necessary for employment of adequate assistance therefor."

Up to this time no substantial progress had been made with the Cherokees, and in the Sixth Annual Report of the Commission (1899), page 9, the Commission says:

"The Cherokees now began to realize the sensations of 'a man without a country,' and again created a Commission at a general session of the national council in November, 1898, clothed with authority to negotiate an agreement with the United States. The earlier efforts of this Commission to conclude an agreement with that tribe were futile, owing to the disinclination of the Cherokee Commissioners to accede to such propositions as the Government had to offer. The Commission now created was limited in its power to negotiate to a period of thirty days. The United States Commission had advertised appointments in Mississippi extending from December 19, 1898, to January 7, 1899, for the purpose of identifying the Mississippi Choctaws, a duty imposed upon the Commission by the Act of June 28, 1898, but on receiving a communication from the chairman of the Cherokee Commission requesting a conference it was deemed desirable to postpone the appointments in Mississippi and meet the Cherokee Commission, which it did on

December 19, 1898, continuing negotiations until January 14, 1899, producing the agreement which is appended hereto. (Appendix No. 2, p. 49.)

“In the meantime the Creeks had, by act of council, created another Commission with authority to negotiate an agreement with the United States, and a conference was accorded it immediately upon conclusion of the negotiations with the Cherokees, continuing to February 1, 1899, when an agreement was concluded. (Appendix No. 3, p. 50.) The agreement with the Cherokees was ratified by the tribe at a special election held January 31, 1899, by a majority of two thousand, one hundred six votes, and that with the Creeks on February 18, 1899, by a majority of four hundred eighty-five.

“While these agreements do not in all respects embody those features which the Commission desired, they were the best obtainable, and the result of most serious, patient, and earnest consideration, covering many days of arduous labor. The Commissions were many times on the point of suspending negotiations, there having arisen propositions upon the part of one of the Commissions which the other was unwilling to accept. Particularly were the tribal Commissioners determined to fix a maximum and minimum value for the appraisement of lands, while this Commission was equally vigorous in its views that the lands should be appraised at their actual value, excluding improvements, without limitations, in order that an equal division might be made. The propositions finally agreed upon were the result of a compromise, without which no agreement could have been reached.

“The desirability, if not the absolute necessity, of securing a uniform land tenure among the Five Tribes leads the Commission to recommend that these agreements with such modifications and amendments as may be deemed wise and proper, be ratified by Congress.”

The agreement with the Creeks of Sept. 27th, 1897, was rejected by them and the agreement negotiated with the Cherokees on January 14, 1899, while ratified by the tribe at an election held January 31, 1899, and the one with the Creeks negotiated February 1st, 1899, although ratified by the tribe on February 18th, 1899, were both rejected by Congress. Therefore, at the time the Curtis Bill, approved June 28, 1898, making provision for the allotment of the lands, was enacted, the Commission had succeeded in negotiating, and having approved by both the United States and the tribes, agreements with the Choctaws-Chickasaws and Seminoles, but had met such opposition among the Cherokees and the Creeks that no agreements had been arrived at upon which the minds of both Congress and those tribes could meet.

The agreement negotiated with the Creeks on February 1, 1899, ratified by the Creeks, and rejected by Congress, will be found beginning on page 59 of the Sixth Annual Report of the Commission. Afterwards, a third agreement was negotiated with the Creeks on the 8th day of March, 1900, which, as amended by Congress, was ratified by Congress, in

behalf of the United States, by act approved March 1, 1901 (31 Stat. L. 861), and subsequently ratified by the Creek Nation on May 25, 1901, and generally known as the Original Creek Agreement.

Also an agreement was afterwards made with the Cherokees in the early part of 1902, and ratified by Congress by an act approved July 1, 1902 (32 Stat. L. 716), and thereafter ratified by the Cherokees on August 7, 1902.

The allotment of Agnes Hawes was made under section 11 of the Curtis Bill approved June 28, 1898 (30 Stat. L. 495).

Section 11 provides:

"That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under Acts of Congress, and known as the 'Dawes Commission,' shall proceed to *allot* the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of *allotment* among the citizens thereof as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of same," etc.

The section also provided:

"That whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home, if the holder so desires."

This section also provides:

“all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits,” etc.

The section further provides:

“When such *allotment* of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval.”

The section makes provision for the removal of intruders, and further provides:

“That the lands *allotted* shall be non-transferable until after *full title* is acquired and shall be liable for no obligation contracted prior thereto by the *allottee*, and shall be non-taxable while so held.”

Section 12 provides:

“That when report of *allotments* of lands of any tribe shall be made to the Secretary of the Interior, as hereinbefore provided, he shall make a record thereof, and when he shall confirm such *allotments* the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this act.”

Section 13 authorizes the Secretary of the Interior to make leases on the lands of any tribe under rules and regulations to be prescribed by him for oil, coal, asphalt and other mineral purposes, the royalties from all leases to inure to the benefit of the tribe.

Section 13 further provides that:

“Where any oil, coal, asphalt, or other mineral is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other land and improvements shall be ascertained under the direction of the Secretary of the Interior and paid to the *allottee or owner* of the land, by the lessee or party operating the same, before operations begin.”

Section 16 makes it unlawful for any person, after the passage of the act, except as therein provided, to claim, demand or receive any royalties on oil, coal, asphalt, or other minerals, or on any timber or lumber, or any other kind of property whatsoever belonging to any one of the tribes or nations, and provides that all royalties, paid to the tribe shall be paid into the Treasury of the United States to the credit of the tribe under rules and regulations prescribed by the Secretary of the Interior. This section contains the following provision:

“That nothing herein contained shall impair the rights of any member of a tribe to dispose of any timber contained on his, her, or their *allotment*.”

Section 22 provides:

“That where members of one tribe, under intercourse laws, usages or customs, have made homes within the limits and on the lands of another tribe they may retain and take *allotment*,

embracing same under such agreement as may be made between such tribes respecting such settlers," etc.

Section 23 provides:

"That all leases of agricultural or grazing land belonging to any tribe made after the first day of January, eighteen hundred and ninety-eight, by the tribe or any member thereof, shall be absolutely void, and all such grazing leases made prior to said date shall terminate on the first day of April, eighteen hundred and ninety-nine, and all such agricultural leases shall terminate on January first, nineteen hundred; *but this shall not prevent individuals from leasing their allotments when made to them as provided in this act, nor from occupying or renting their proportionate shares of the tribal lands until the allotments herein provided for are made.*"

Section 26 is as follows:

"That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

Section 28 abolished all the tribal courts.

Under section 11 of the Curtis Bill she was allotted the land, the minerals being reserved to the tribe.

Under section 12 she is referred to as an allottee. Likewise, section 13 refers to her as an allottee. And similar language is used in sections 16, 22 and 23.

While the Commission said on page 6 of its Fifth Annual Report, 1898, "therefore, in many of the more difficult details of allotment and other features of that law (meaning the Curtis Bill) it will hereafter be enforced only in the Cherokee and Creek Nations," as a matter of fact no allotments were made under it in the Cherokee Nation because the Commission did not reach the Cherokees till after the Cherokee Agreement of 1902.

There is nothing in the Curtis Bill of 1898, section 11, or any other section thereof, postponing the allotment of the lands until the Secretary had approved the rolls. The Dawes Commission, by section 21 of the Curtis Bill, was authorized and directed to make the rolls. The Secretary did not make the rolls and had no authority to enroll the name of any citizen. That was the jurisdiction of the Commission. The eleventh paragraph of section 21 of the Curtis Bill provides that:

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The Secretary's approval was merely required to impart finality to the list, roll or census, so there might be an end to the matter. Not until during the fiscal year ending June 30th, 1902, were the rolls

submitted to the Secretary for his approval. (See Ninth Annual Report of the Dawes Commission for the fiscal year ending June 30, 1902, page 39.)

The government's survey of all the lands of the Creek Nation had been completed long prior to April 1st, 1899, and maps showing the sections and quarter sections were in the custody of the Dawes Commission prior to April 1st, 1899. Necessarily, this must be true, otherwise, the Commission could not have allotted the lands.

In the Sixth Annual Report of the Dawes Commission (1899) pages 18 and 19, a history of the opening of the Land Office in the Creek Nation on April 1st, 1899, is given, and the authority from the Secretary of the Interior to open the Land Office at that time is also recited. And the manner and practice of allotting the lands to the Creeks under the Curtis Bill is clearly detailed. (See full copy of Commission's Report on pages 40, 41 and 42, original brief for appellant.) The Commission says:

“If, on entering the land office, the applicant is found to be already enrolled on a card, and his citizenship is undoubted he is at once furnished with a certificate of enrollment. If not, the necessary data is secured and enrollment made as prescribed under the head ‘enrollment of citizens,’ the commissioner in charge of the land office passing upon all doubtful claims. When enrolled the certificate of enrollment is presented by the applicant to an experienced land clerk, who locates the land desired and fur-

nishes the applicant with a small diagram bearing the proper description and showing the subdivision claimed. This is made up from information elicited from the applicant with the aid of photolithographic township plats. * * * On receiving the diagram and description of his selection, the applicant presents same to a selection clerk, whose plats graphically indicate selections already made, and who compares the descriptions thus presented with those previously filed upon, to guard against a second filing upon the same tract."

The plat used by the selection clerk is shown by Exhibit 9 between pages 63 and 64 of the said Sixth Annual Report. An examination of this exhibit shows it to be a geographical and geological survey of the entire Creek Nation, showing sections and quarter sections. The Sixth Annual Report was transmitted by the Dawes Commission to the Secretary of the Interior on September 1st, 1899, and it, therefore, must be a fact that the survey of the Creek Nation had been completed prior to that time, otherwise the Commission could not have set forth as Exhibit 9 a survey of the entire Creek Nation, showing section and quarter section lines, etc.

In *New York Indians v. United States*, 170 U. S. 1, 42 L. ed. 927, this court held that documents emanating from the executive and legislative departments of the government may be judicially noticed on appeal, though they were not incorporated in the findings of the court below.

The Secretary of the Interior, on October 7th, 1898, prescribed written rules and regulations for the purpose of carrying into effect the Curtis Bill, and providing for the appraisement and allotment of the lands. (See Sixth Annual Report of the Commission, 1899, pages 81 to 83.)

It will be noticed that the Curtis Bill does not provide specifically for the number of acres to be allotted to any particular citizen, but simply directs the Commission, after the land has been surveyed to

“proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible to allotment,” etc. * * *
“giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same.”

The Secretary of the Interior, in the rules above referred to, prescribed October 7th, 1898, designated the number of acres to be allotted to the citizens in the various tribes as follows:

“Selections of land may be so made by members of the several tribes in quantities not to exceed 160 acres to each Creek, 80 acres to each Cherokee, 240 acres to each Choctaw and each Chickasaw, and 40 acres to each Choctaw and each Chickasaw Freedman.

“And the balance of the lands belonging to each tribe shall be left uninclosed and open for the common use of all members of the tribe until final allotment, and then be divided among them, according to the provisions of said Act of Congress and agreement where agreements

have been ratified, so that every member shall have his fair and equal share of all the lands of his tribe."

No patents to any Creek allotment were delivered prior to December 20th, 1902. (See Dawes Commission's Tenth Annual Report, 1903, page 39.)

Opposing counsel may call attention to the fact that the Curtis Bill did not designate the number of acres to be allotted to each citizen. Section 15 of the Indian Appropriation Act approved March 3rd, 1893 (27 Stat. L. 645), creating the Dawes Commission, provided for the "allotment of lands in severalty not exceeding one hundred sixty acres to any individual," etc. The Secretary, at the time he ordered the Land Office opened in the Creek Nation, and fixed the number of acres to be allotted under the Curtis Bill, adopted the maximum allowed under the Act of 1893.

The Commission, in its Sixth Annual Report (1899), page 20, says:

"Up to and including June 30, 1899, three thousand eight hundred selections were filed on in the Creek Nation."

And in the Commission's Seventh Annual Report (1900), page 29, they say.:

"Up to and including June 30, 1900, there have been 10,000 selections filed in the Creek Nation, amounting approximately to two-thirds of the total number of citizens, and covering the most thickly settled and improved lands of the nation." (Italics ours.)

On account of the character of the title of the Five Civilized Tribes to the tribal lands, the title being in the tribe as a political entity, there was grave doubt at the time, as to the constitutionality of the Curtis Bill providing for the allotment of the lands without the consent of the tribes. For this reason the Secretary of the Interior and the Commission earnestly sought to obtain the consent of the tribes to the allotment of their lands.

That Congress had plenary power to dissolve the tribal government and allot the lands among the individual members without the consent of the tribe is no longer open for question.

—*Lone Wolf v. Hitchcock*, 187 U. S. 553, 47 L. ed. 299;

Gritts v. Fisher, 224 U. S. 640;

McKee v. Henry, 201 Fed. 74.

As pointed out, on March 8, 1900, the Commission negotiated a third agreement with the Creeks, which as amended by Congress, was ratified by Act of Congress approved March 1, 1901 (31 Stat. L. 861), and thereafter ratified by the Creek Nation on May 25, 1901. Bearing in mind that previous to this agreement, hereafter designated the "Original Creek Agreement," several thousand allotments had been made in the Creek Nation between April 1, 1899, the date the Land Office opened, and the date of this agreement, it is important to examine said agreement to ascertain what provision it makes, if any, with respect to such allotments.

Section 6 of said Original Creek Agreement is as follows:

“All allotments made to Creek citizens by said Commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said Commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said Commission.”

Point Two.

The land in question was not allotted to the heirs of Agnes Hawes under section 28 of the Original Creek Agreement, and for that reason section 28 does not name the law of descent, and the status of this allotment was in no way affected by section 28 of the Original Agreement. The allotment was confirmed by section 6 of the Original Agreement, and we may strike out and ignore section 28 entirely, and yet this allotment survived to the heirs and was in all respects ratified, that ratification relating back to the inception of the title, to-wit: the date of the allotment.

Section 28 provides that:

"No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement."

The section then provides:

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (meaning the Curtis Bill), shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died *since that time*, or may hereafter die, *before* receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs, etc., and be allotted and distributed to them accordingly."

Such a retroactive provision is not found in any of the agreements with the other tribes.

As pointed out, section 35 of the Choctaw-Chickasaw Agreement, prohibited the allotment to heirs of a person, although enrolled, where such citizen died prior to the date of the final ratification of the agreement. Likewise, the only agreement made with the Cherokees, approved by Act of Congress of July 1st, 1902 (32 St. L. 716), provides in section 25 that:

"The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all per-

sons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes."

This excluded from enrollment all Cherokees who died prior to September 1st, 1902.

Section 20 (Cherokee) provides for an allotment to the heirs only in cases where the enrolled member died after the 1st day of September, 1902.

In the Creek Nation, however, it was the policy of the tribe and the United States to partition the tribal property *as of April 1st, 1899*. The division was to be made as of that date, although the agreement of March 8th, 1900, with the Creeks, was not ratified for more than two years after that time. April 1st, 1899, was fixed as the date of distribution because the Land Office in the Creek Nation had been opened on that date, and between April 1st, 1899, and the signing of the Original Creek Agreement, there had been more than 9,000 allotments made to Creek citizens under the Curtis Bill, and both Congress and the tribe, recognizing that the Curtis Bill passed equitable title in fee to the surface to all those allottees selecting allotments after April 1st, 1899, deemed it just and equitable to partition the common tribal property as of April 1st, 1899.

Now this section 28 provides for an allotment to the heirs in only two cases:

First. Where the citizen, living on April 1st, 1899, had died prior to the ratification of the agree-

ment "*before* receiving his allotment of lands and distributive share," etc.; and,

Second. Where the citizen living April 1st, 1899, died *after* the ratification of the agreement "*before* receiving his allotment," etc.

Agnes Hawes did not fall within either of these classes. She did not die after April 1, 1899, and prior to the ratification of the agreement, "*before* receiving her allotment of lands," etc. She died on June 29, 1900, prior to the ratification of the agreement, *but she had received her allotment*. She was among the number of over 9,000 receiving allotments prior to the signing of the Original Agreement, and, consequently, she did not fall within any of the provisions of section 28. Neither the Secretary of the Interior nor the Dawes Commission, construed her as falling within section 28. No allotment was made to her heirs by the commission; *no allotment was ever selected by her heirs*. Her heirs had no right to select or *make any choice* of an allotment in the Creek Nation, the allotment to which they fell heir having been selected during the lifetime of their ancestor, and certificate of allotment issued to her by the Commission.

Therefore, the conclusion positively follows that the land in this case having been allotted to Agnes Hawes during her lifetime fell within the provisions of section 6 of the Original Agreement. The court below however, said that section 6 could have

no application because it only applied to living allottees. If section 6 had no effect on this case, then the land in question has never been allotted, because neither in this case, nor any other similar case, where the allottee died after the selection of his or her allotment and before the ratification of the Original Agreement, were the heirs permitted by the Commission to select an allotment, and we do not believe any such effort was ever made by heirs to select an allotment under section 28, where the allotment had previously been made under the Curtis Bill.

Section 6, Original Agreement, applies to the living, as well as the dead, and *vice versa*. It says:

“All allotments made to Creek citizens by said Commission prior to the ratification of this agreement * * * are confirmed, and the same shall, as to appraisement and *all things else*, be governed by the provisions of this agreement.”

Point Three.

Agnes Hawes, the Curtis Bill allottee, possessed an estate of inheritance, the minerals being reserved to the tribe, and upon her death her heirs inherited the allotment.

This point is held to be correct by the United States Circuit Court of Appeals for the Eighth Circuit in *Welty, appellant, v. Reed, appellee*, handed down on February 3, 1915, and a full copy of the

court's opinion is in the appendix to this brief; also, that case was argued and fully briefed by both sides on this very point; and, likewise, we think the exact question is decided by this court in *Goat v. United States*, 224 U. S. 458-471, construing the Seminole Agreement of 1897, which reserved to the tribe the minerals, the opinion in that case being more fully discussed on pages 82 to 84 in this brief.

In order that the court may fully understand the methods and practice pursued by the Dawes Commission in making allotments under the Curtis Bill we quote the following from the Sixth Annual Report of the Commission (1899) beginning on page 18, to-wit:

“The rules and regulations of the Department, prescribed October 7, 1898, to govern the selection and renting of prospective allotments (Appendix No. 8, p. 81), contain the following provision:

“ * * * to give effect to the provisions of said act according to its design, and to enable every member of each tribe to select and have set apart to him lands to be allotted to him in amount approximating his share as aforesaid, the Commission to the Five Civilized Tribes is instructed as a means preparatory to and in aid of the duty of allotment of the lands of said tribes, required of it by said act, to proceed as early as practicable to establish an office within the territory of each tribe, provided with proper and suitable records, including a copy of the United States survey of the

lands of the tribe, for the purpose of registering each and every selection of lands made by any member of the tribe for his allotment. * * *

“It was not deemed by the Commission practicable to attempt the establishment of such offices in all five tribes until a satisfactory method of procedure and system should have been devised and established in one, and by practical experience demonstrated as productive of satisfactory results, and until the rolls of citizens in those tribes should be closed.

“The initiatory work being experimental and requiring the close attention of the Commission, such office was established at Muskogee, in the Creek Nation, where the general office of the Commission is located, thus enabling the Commission to better superintend its operations. Due notice was given by publication, as required by the rules of the Secretary, and the office opened for the selection of allotments on April 1, 1899.

“As already indicated, the full-bloods of the Creek Nation have been slow to accede to the policy of the Government, as expressed in recent legislation, and the work of enrolling has been materially retarded by a clear determination on their part to ignore the requirements of the Commission. Upon the establishment of a land office at Muskogee, however, it became evident to them that unless they appeared for enrollment they would not be permitted to select their lands, and they have since been presenting themselves for enrollment.

“To accomplish the work of enrollment and recording the selections of the Creeks, the Commission found it practicable and of material ad-

vantage to place an enrolling clerk in the land office. By this method each applicant is examined as to his citizenship before he is permitted to make application for a selection, saving much time to the land office proper. If, on entering the land office the applicant is found to be already enrolled on a card, and his citizenship is undoubted he is at once furnished with a certificate of enrollment. (Exhibit No. 5, p. 60.) If not, the necessary data is secured and enrollment made as described under the head, 'Enrollment of Citizens,' the Commissioner in charge of the land office passing upon all doubtful claims. When enrolled, the certificate of enrollment is presented by the applicant to an experienced land clerk, who locates the land desired and furnishes the applicant with a small diagram (Exhibit No. 6, p. 61) bearing the proper description and showing the subdivision claimed. This is made up from information elicited from the applicant with the aid of photolithographic township plats. Different from the class of people who are applicants for homesteads at United States district land offices throughout the United States, these people rarely know the proper description of the lands upon which their homes and improvements are located, or which they desire to select from the open domain. Exhibit No. 7, p. 62, shows specimens of descriptions presented by applicants intended to indicate the location of their selections.

"On receiving the diagram and description of his selection, the applicant presents same to a selection clerk, whose plats (Exhibit No. 9, p. 64) graphically indicate selections already made, and who compares the descriptions thus

presented with those previously filed upon, to guard against a second filing upon the same tract. He further ascertains whether selection applied for is crossed by any railroad rights-of-way, meandered streams, etc., in order to determine the acreage of the land selected. If the land applied for is found clear, the subdivision selected is indicated on the memorandum plats by the principle of a circle, a complete circle representing a quarter section, a half circle 80 acres, etc. The application (Exhibit No. 10, p. 65) is then filled out by the selection clerk with the names of the members of the family, description and acreage of the lands selected, and passed to the member of the Commission in charge, who closely examines the applicant under oath as to whether he has been on the lands so selected and knows the location and character of the soil, whether they are suitable for homes, whether there are any other claimants, whether there are any schools, churches, or other public buildings on the lands, and such other questions as are deemed necessary to establish the claimant's right to the selections made. A verbatim stenographic record is made of each applicant's statement and filed with the application. If the Commissioner finds the applicant entitled to the selection, the application is passed to a draftsman, who makes the proper entry on a township diagram (Exhibit No. 11, p. 69), of which the Commission has one for each township in the Creek Nation. When noted on the diagram, the selection is recorded in writing on the tract book (Exhibit No. 12, p. 73), and a certificate of selection (Exhibit No. 13, p. 76) is issued to the applicant."

The title of the Creek Nation to the lands of the tribe was nothing further than a base or determinable fee.

In the Indian Appropriation Act, approved March 3, 1893 (27 St. L. 645), the United States expressly gave its consent to the allotment of the lands of the Creeks in severalty among the members, and declared that

“upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.” (See section 15, Act of March 3, 1893, 27 St. L. 645.)

The United States, in that same act, announced its purpose to adjust the affairs of the tribes, and allot their lands in severalty, so that the Indians might be prepared for statehood.

Therefore, it is our contention that when the lands in the Creek Nation were allotted under the provisions of section 11, and the other sections of the Curtis Bill of 1898 (30 St. L. 495), the Creek citizens to whom the lands were actually allotted thereunder became vested at least with an equitable title of inheritance in the lands set apart to them, all minerals, however, being expressly reserved to the tribe. That the owner in fee of the land may convey an estate of inheritance therein, and at the same time reserve to himself all the minerals, is well settled. Also the minerals may be conveyed and the title thereto severed from the title to the surface.

Cyc, Vol. 27, p. 681, says:

“Conveyances of Land Reserving Minerals or of Minerals Without Land. a. Surface and Mineral Rights Severable. Although the owner of the surface is prima facie the owner of the minerals beneath the surface, and a general conveyance of the land will carry the minerals, it is consistent with the nature and adaptation of mineral property that different persons should own the surface and the underlying minerals, and so the owner of land containing minerals may segregate one from the other, by a conveyance or instrument in writing, so that there is a complete severance of title and separate estates are created.”

The severed estate will pass by descent (13 Cyc 675).

We are not unmindful of the decision of the Supreme Court of Oklahoma in *Barnett v. Way*, 29 Okla. 780, where the court held that the allottee, under the Curtis Bill, obtained nothing further than a mere life estate, and that upon his death his heirs obtained no rights in the land allotted and likewise the same in this case.

The opinion in the *Barnett* case, however, is the original decision of the court announcing this rule, and the subsequent case on the question, or analogous points, is based on the opinion in the *Barnett* case.

An examination of the record in the *Barnett* case, as well as subsequent cases, will disclose a failure upon the part of counsel to fully brief the

case and present to the court the points presented in this argument. An examination of the opinion of the court will disclose a failure to appreciate and *give any effect to the provisions of the Curtis Bill providing for allotment*. Beginning on page 788, the court, in the *Barnett* case, said:

“Section 11 of the Curtis Act is not clear in its meaning. Language may be found therein upon which it may be contended with some reason that it was the legislative intent that an allotment made by the Dawes Commission under the authority of that section to a member of any of the tribes or nations should vest in such allottee the title or the right to the title in the lands allotted. The same sentence of the section that provides for the allotment of the use and occupancy of the surface provides that the oil, coal, asphalt, and mineral deposits in the lands of the tribes shall be reserved to the tribe, and no allotment of such land shall carry title to such oil, coal, asphalt, or mineral deposits. Applying the familiar rule of construction, ‘*expressio unius est exclusio alterius*,’ it would seem from this language that it was intended that an allotment made under this statute should carry to the allottee the right or the title of the tribe in the lands allotted, except as to any oil, coal, asphalt, or mineral deposits that might be found therein.”

The court further said:

“As hereinbefore stated, this act also contained a proposed treaty with the Creek tribe, section 1 of which provides that there shall be allotted out of the lands owned by the Creek Nation to each citizen of the Creek Nation 160

acres; and section 12 provides that, after the completion of such allotments, there shall be executed and delivered to each allottee a patent, conveying to him all right, interest and title to the lands so allotted. It is clear that it was intended by these provisions of the proposed treaties to allot not only the use and occupancy of the lands to the individual members of the tribe, but the land itself, and to extinguish the tribal title by conveying it to the allottees. But the act provides that the provisions of these treaties shall not become effective unless the treaties be ratified by the tribes before dates fixed in the act. To hold that it was intended by section 11 to authorize the Commission to allot the lands, and by the allotment thereof to vest the title or the right to the title in the allottees, would render the provisions of this act inconsistent and convict Congress of gross duplicity in its dealings with the Indians under this act; for under such construction, by the treaty provisions of the act, Congress said to the Creek, Choctaw and Chickasaw Tribes, 'If the tribes consent, the tribal lands will be allotted and title divested out of the tribes and vested in the allottees'; and section 11, said that such will be done, whether the tribes consent or not. It is a general rule of construction, without exception, that an act shall be construed so as to give effect to all its provisions, if such construction is not inconsistent with the general purpose of the act and its provisions are not necessarily conflicting. *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. ed. 152."

The court assumed too much. It assumed that the Curtis Bill, in allotting merely the occu-

pancy and exclusive use of the surface, intended to transfer nothing to the allottee except a mere possession for life, and the court seems to arrive at this conclusion largely upon the assumption that to hold otherwise would convict Congress "of gross duplicity in its dealings with the Indians," the Curtis Bill providing also for the ratification of the agreement negotiated with the Creeks on September 27th, 1897.

Our answer to that is, that prior to the execution of the Original Agreement made with the Creeks on the 8th day of March, 1900, nearly ten thousand Creek citizens had availed themselves of the benefits of the Curtis Bill, and selected their allotments thereunder, the final rolls of the Creek Nation showing a little more than fifteen thousand citizens. And yet in the Seventh Annual Report of the Commission for the fiscal year ending June 30th, 1900, it is said:

"Up to and including June 30, 1900, there have been 10,000 selections filed in the Creek Nation, amounting approximately to two-thirds of the total number of citizens, and covering the most thickly settled and improved lands of the nation."

There was no duplicity, or underhand dealing, upon the part of Congress. The Creek Indians had the alternative of either ratifying the agreement made with the Commission on September 27th, 1897, and approved by the Curtis Bill, or accepting the

provisions of the Curtis Bill providing for the allotment of their lands and the dissolution of their tribal government.

And section 30 of the Curtis Bill expressly declared that the agreement "shall be of full force and effect, if ratified before the first day of December, 1898, by a majority of the votes cast by the members of the tribe at an election to be held for that purpose; * * *. And if said agreement, as amended, be so ratified, *the provisions of this act shall then only apply to said tribe where the same do not conflict with the provisions of said Agreement, etc.*"

Thus Congress clearly and openly announced to the Creeks that their lands would be allotted under the provisions of the Curtis Bill, unless they ratified the agreement, and in that event the allotments would be made under the agreement.

We shall not undertake to further discuss or analyze or criticise the *Barnett* decision, but we do call this court's attention to the fact that the court, in the *Barnett* case, applied the law of descent as of the date of the death of the allottee, retroactively, and not as of the date the Original Agreement was ratified and became law.

Section 11 of the Curtis Bill provides that

"the Dawes Commission shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as pos-

sible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same; but all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits."

Section 11 further provides:

"That the lands allotted shall be non-transferable until after *full title* is acquired and shall be liable for no obligations contracted prior thereto by the allottee, and shall be non-taxable while so held."

Sections 13 and 16 authorize the Secretary of the Interior to lease the lands for mineral purposes, the royalties accruing under such leases to be collected and held by the United States for the benefit of the tribe.

Section 16 also provides:

"That nothing herein contained shall impair the rights of any member of a tribe to dispose of any timber contained on his, her, or their allotment."

Just why such an allotment did not vest the allottee with at least an equitable title of inheritance in the land, excepting therefrom the minerals, is hard to see, especially in view of the purpose Congress had in mind in allotting these lands in severalty. In the Indian Appropriation Act of 1893, Congress expressly declared that the members of

the tribe should become citizens of the United States upon the allotment of the lands.

The allotment of the lands to the Indians should not be considered as a mere donation upon the part of the Federal Government, but the recognition of a great right, both moral and legal. This great principle was recognized by Chief Justice MARSHALL, in *Worcester v. Georgia*, wherein the court held that the allotment of lands to Indians under agreements and treaties with them should not be considered as a favor conferred, but rather a right acknowledged.

There is another great principle underlying the whole scheme: In referring to the Indian title and allotment, this court, in *Worcester v. Georgia*, 6 Peters 515, said:

“To contend that the word ‘allotted’ in reference to the land guaranteed to the Indians in certain treaties, *indicates a favor conferred rather than a right acknowledged*, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.”

Says Chief Justice MARSHALL, in *Johnson v. McIntosh*, 8 Wheat, 543, 603, 5 L. ed. 681;

“It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.”

So, in *United States v. Cook*, 19 Wall. 591, 593, 22 L. ed. 210, the court, speaking through Mr. Chief Justice WAITE, says:

“The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy.”

Yet later, in *Beecher v. Wetherby*, 95 U. S. 517, 525, 24 L. ed. 440, the court says:

“But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians. That occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.”

And, again, in *Spalding v. Chandler*, 160 U. S. 394, 402, 16 Sup. Ct. 360, 364, 40 L. ed. 469:

“It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land, with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered

to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to-wit, the right to possess and occupy the lands for the uses and purposes designated."

In *Parr v. United States*, 153 Fed., the Court had under consideration a similar question, and said:

"Now, while it is true that the government can dispose of the fee, in absolute derogation of the possessory rights of the Indians, yet unless the government assumes, itself, to extinguish the Indian title, its grantee takes subject and subordinate to their possessory right. Upon the other hand, the Indian title cannot be conveyed by the Indians to any one but the United States without the consent of the latter. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. ed. 299; *United States v. Alaska Packers' Association*, (C. C.) 79 Fed. 152. So that, in consideration of the long-settled policy of the general government, the Indians possess such a right of occupancy in and to the lands set apart to them by treaty out of their larger dominions as no one except the government itself can disturb; and the government has always, unless in exceptional cases, respected that right, and treated it as one of property.

"The government having the fee of the lands upon the Umatilla reservation, and the Indians the right of exclusive occupancy and possession, the Congress has provided for allotments of such lands in severalty, but not until the consent of the Indians thereto shall have been given; nor by the act has Congress de-

parted essentially from the stipulations of the treaty in that behalf. Looking back to the treaty, therefore, the intendment with both the government and the Indians was that the latter at some time, when developments had demonstrated their capacity to manage successfully their property affairs, should come into the ultimate title to those lands, or a portion thereof, in severalty, and be able to hold and enjoy them as citizens of the United States and of the states hold and enjoy real property; there being a joint ownership by occupancy on the part of the Indians. The fee being in the government, the allotments were had with a view to clothing the Indians with the fee in particular tracts in severalty. *There was no donation or grant in the sense of disposing of the public domain to settlers thereon, but a fulfillment of treaty stipulations; the consideration for the allotments having long since been fully performed on the part of the Indians, and they having yet only to demonstrate their capacity to manage the property to entitle them to the fee absolute. To 'allot' is:*

'To divide or distribute, as by lot. To distribute or parcel out in parts or portions; or to distribute to each individual concerned; hence, to grant, as a portion; to give, assign, or appoint in general.' Webster's Unabridged Dictionary.

"So the purpose and process here was to distribute to each person concerned, in full accord with treaty regulations, that which was understood and conceded to rightfully belong to the Indians themselves, although the fee was held for them by the United States in the capacity of guardian of their property and estate; the allotment being intended as in the nature of

a partition among joint owners of realty, whereby there should be set apart to each owner a single portion in severalty as and for his joint interest or property in the whole. The United States in making the allotments was dealing with the fee, and yet conceding that the Indians were entitled to it, and providing that in due time they should have it. *'Allot' is not a term of sale or grant, but of apportionment of that to which the parties are entitled as of right.* The Honorable WILLIAM H. TAFT, Solicitor General, advising as to the allotment of lands to individual Indians, asked: 'What is the Indian right of occupancy?' To which he answered:

'It is the right to enjoy the land forever, with the right of alienation limited to one alienee, the United States, or to such persons as the United States, in its capacity of guardian over the Indians, may permit.'

"And then, after stating the government's relation to the Indians as guardian, he makes this further observation:

'Allotments in severalty of Indian land are therefore naturally evolved from the Indian right of occupancy.' 20 Opinions Attorney General, 42, 48."

This doctrine was clearly recognized by this court in the recent case of *Choate v. Trapp*, 224 U. S. 671, wherein Mr. Justice LAMAR said:

"The individual Indian had no title or enforceable right in the tribal property. But as one of those entitled to occupy the land he did have an *equitable interest, which Congress recognized and which it desired to have satisfied and extinguished.* The Curtis Act was framed

with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim in the other property of the tribe formerly held for their common use. For, the Atoka Agreement, after declaring that 'all land allotted should be non-taxable,' stipulated further that each enrolled member of the tribes should receive a patent framed in conformity with the Agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement and to relinquish all of his right in the property formerly held in common."

Bearing in mind the purpose the United States desired to accomplish under the Curtis Bill, that is, to allot these lands and make the Indians citizens of the United States, and promote their general welfare, can it be contended for one moment that it was intended to give the allottee nothing further than a mere right of occupancy *for life*, that "exclusive use and occupancy" allotted to him to revert to the tribe and become a part of the public domain upon his death? *The Creek Indians had all these rights before the allotment.* They had a right to inclose and cultivate lands of the tribe, and their farms and rights of occupancy, upon their death, although the title was in the tribe, passed to their heirs, and was administered as a part of their estate under the tribal laws. A mere life tenant would have no incentive

to permanently improve his allotment, and yet Congress must have intended by the Curtis Act to promote all the advantages of private ownership and thrust on the Indians all the responsibilities of American citizenship, intending ultimately to create a state out of their territory.

The least that can be said is that the allottee under the Curtis Bill took in severalty the title formerly held in common by all or by the tribe as a political entity for all the members, to-wit: "the exclusive use and occupancy," exclusive of the minerals. The Indian title was allotted and that was an estate of inheritance.

This "sacred right of occupancy" undoubtedly descended to the heirs of the allottee with all permanent improvements and did not revert to the tribe and become open to allotment to a stranger.

This "sacred right of occupancy" in the individual member in possession of a fractional part of the public domain before the Curtis Bill, was recognized in the Curtis Bill, whereby it is provided in section 11 as follows:

"That whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home if the *holder* so desires;"

and in this connection more light is thrown on the point by section 17, which should be carefully examined.

The Creek Nation had a written Constitution providing for a republican form of government to be conducted under the three co-ordinate branches, to-wit: the legislative, executive, and judicial.

The National Council of the Creek Nation, by an act duly approved October 11th, 1893 (Acts and Resolution of the National Council of the Muskogee Nation, 1900, page 5), under the head (Fence—Lawful Farm) prescribed that a lawful rail fence shall be seven rails high, well staked and double-ridered; a straight fence so and so; a lawful wire fence shall be eight wires, etc.; and section 14 provides that:

“When any citizen shall have a lawful fence as defined in this act, and the stock or property of another citizen shall damage or injure his crops, he shall be entitled to damages for such injury, which shall be assessed by two disinterested persons, said persons to be appointed by the judge of the district wherein said damage is done.”

And section 15 provides that:

“No citizen not having a lawful fence shall be entitled to damages done to his crops by the stock of another.”

In the Constitution and Laws of the Creek Nation of 1893 (McKellop), duly printed and published, certain exemptions from levy and sale under execution are provided for, and section 254 makes it unlawful “to levy upon and sell, under any execution or decree of any court, any improvement upon the public lands to satisfy any debt by contract.”

In the Constitution and Laws of the Muskogee Nation, 1893, by McKellop, page 57, will be found the following section, under the caption, "Vacated Places," to-wit:

"Section 147. Places which have been vacated, without fencing or houses, for the term of five years, shall be liable to settlement and improvement by any person, and any one who may settle upon such places shall have all the rights to them as if they had never been occupied before."

Likewise, on page 94 of the Constitution and Laws of the Muskogee Nation, 1893, by McKellop, under the head of "Wills and Administration," we find the following section, to-wit:

"The *homestead* and kitchen furniture, one work horse, one cow and calf, and one breeding sow, shall be exempt from seizure or force sale for any debt against the *estate*."

The section just preceding the above quoted section, provides that:

"The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the *estate* if there are no children, and a child's part, if there should be children, in all cases where there is no will. The husband surviving shall inherit of the deceased wife in like manner."

Section 333, on page 115 of the same Laws and Constitution of the Muskogee Nation, provides that any citizen

“head of a family, engaged in the keeping or grazing of livestock in this nation, shall for that purpose be entitled to enclose for his exclusive use, free from any manner of tax, one mile square of the lands of the public domain; but such enclosure shall not intrude on the rights of any other citizen without his or her consent.”

These sections of the Creek published laws preserve to the heirs of the deceased occupant the *homestead*, and make it free from seizure or force sale for any debt against the estate.

The Eighth Circuit Court of Appeals, in *Davison v. Gibson*, 56 Fed. 443, had before it a case involving the descent of a forty-acre farm improved and in the possession of a Creek freedwoman. It does not appear, from the statement of that case, and the opinion of the court, that anybody contended that the forty-acre farm reverted to the tribe upon the death of the occupant, although the land had not been allotted.

Indian title by occupancy before allotment was sufficient title on which to base ejectment.

—*Hockett v. Alston*, 58 S. W. Rep. 675;

James v. Smith, 58 S. W. 715;

Hockett v. Alston, 110 Fed. 910;

Wilson v. Owens, 86 Fed. 572.

That the right of occupancy descended, see *Rush v. Thompson*, 53 S. W. 333, and *Nivens v. Nivens*, 64 S. W. 604, all Indian Territory cases.

The nation had a duly authorized Supreme Court provided for by its constitution. The records of that court are in the custody of the federal government, and in the archives of the Interior Department.

That court had before it, in 1880, '81 and '85 (justice proceeded slowly in the Creek Nation as well as other courts), the case where one Ann Rogers, a Creek citizen, was the owner of a certain farm at the date of her death; she left a non-citizen husband, and the case involved the question as to whether or not the brothers and sisters of the deceased Ann Rogers were entitled to the property, or the non-citizen husband. Quite an elaborate written opinion was filed by the Supreme Court of the Creek Nation in that case, and among other things the court said:

“It is also shown that John T. Rogers, in his answer to the allegations by the petitioners before said John Q. Tufts, United States Indian Agent, stated that the place on which Mrs. Rogers lived was the property of herself, and no one else. This he failed to substantiate by evidence, for the property was made the property of William Fisher. From this it is evident that the said Rogers was in this matter actuated by unseen and unlawful motives.”

In the appendix to this brief, the court will find decisions of the Supreme Court of the Creek Nation clearly showing that Creek citizens had the right to inclose a part of the public domain, improve the same, and on their death, the right to the posses-

sion of the inclosure and the improvements thereon, passed to the heirs.

The Creeks, in 1898, as well as for many years previous thereto, were not mere blanket Indians. The Choctaws, Chickasaws, Seminoles, Cherokees and Creeks have been known for more than half a century as the Five Civilized Tribes, and Congress, in dealing with Indian affairs, has uniformly dealt with these Five Tribes separately and apart from the general legislation for tribal Indians. Can it be said that Congress intended to confer upon the citizens of these tribes receiving allotments under that act nothing further than the mere right to occupy the particular land described in the allotment for life, and at death the land to revert to the tribe as a part of the common domain? *If so, the Curtis Bill was a fraud in its conception and a failure in its execution, and placed the Indians, after allotment, in a worse condition than before, because prior to allotment their right of occupancy, with all improvements thereon, was descendible to their heirs.*

In *Shulthis v. McDougal*, 170 Fed. 529, the Court of Appeals for the Eighth Circuit had before it the application of the law of descent to allotments set apart in the name of a deceased Creek child under section 7 of the Supplemental Creek Agreement (32 St. L. 500). Said section 7 is as follows:

“All children born to those citizens who are entitled to enrollment, as provided by the Act of Congress approved March 1, 1901 (31

Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

The language of this section is nearly the same as used in section 28 of the Original Creek Agreement.

In the *Shulthis* case the allotment was not made to the child during lifetime, but was set apart in the name of the deceased child some time after its death. It was admitted by counsel for all parties that the heirs under section 7 did not, technically speaking, acquire the allotment by descent, but it was contended, and held by that court, that for all practical purposes the status of the allotment should be treated and considered by the court as if the heirs obtained the same, technically, by inheritance, and not by purchase. Speaking through Judge AMIDON, the court said:

"They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to proceed by analogy only. The tribal lands belonged to the tribe.

The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon the share in the tribal property. It was granted to the tribe by the federal government not only as the home of the tribe, *but as a home for each of the members.* From the time they took up their residence west of the Mississippi, the Constitutions of the Five Nations provided that their land should remain *'common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them.'* The term *'improvements,'* as here used, meant not only betterments, but occupancy. *Cherokee Nation v. Journeycake*, 155 U. S. 196, 210, 15 Sup. Ct. 55, 39 L. ed. 120. These *'improvements'* passed from father to son, and were the subject of sale, with the single restriction that they should not be sold to the United States, individual states, or to individual citizens thereof. Under such regulations the members of the Creek Nation had been in possession of homes on their tribal lands for more than half a century. The portion of their lands which were not occupied in severalty, as well as the tribal funds, were treated as belonging to the members, and all income derived therefrom was distributed among them per capita. While the legal title to the tribal property belonged to the tribe as a political society, *the beneficial use of the same had at all times belonged to the mem-*

bers in severalty. It was to such a condition of life and property as this that the plan of allotment here involved was to be applied. Its controlling principle is a clear recognition that each member of the tribe, by virtue of his membership, was entitled to an equal share in all the tribal property."

And, in this same connection, this court further said:

"To carry out the scheme, the law first proceeds on the one hand to ascertain the membership of the tribe, and on the other the actual present value of its property, and then directs that the tribal property be divided per capita so that each member shall receive an equal share thereof, according to its true value. The right to such a share is *not created* by the statutes, but is simply recognized and enforced by them. The several agreements and Acts of Congress are not concerned with the legal title, but go back to the actual beneficial rights of property as they had always existed in Indian Territory. They require allotments to be made so as to save to each member his improvements, including his right of occupancy. While the tribe in carrying out the project grants the legal title to the property, it does not confer the right to that property. The act by which the distribution is made is spoken of not as a grant, but as an allotment. We are not departing from the well-established doctrine of the Supreme Court that the lands of these Indians belong to them as a political society and not to the individual members. *Cherokee Trust Funds*, 117 U. S. 288, 308, 6 Sup. Ct. 718, 29 L. ed. 880; *Delaware Indians v. Cherokee Indians*, 193 U. S. 127, 24

Sup. Ct. 342, 48 L. ed. 646. So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act."

This is a much stronger case than that presented in the *Shulthis* case. There the citizen died before the land was allotted to him; the land was allotted in his name after his death, and, technically, passed to his heirs by purchase, but that court held that it should be considered, in applying the law of descent, as if the child had died seized and possessed of at least an equitable estate of inheritance in the land. In applying the law of descent the Supreme Court of Oklahoma followed the *Shulthis* decision.

—*Pigeon v. Buck*, 131 Pac. Rep. 1083.

It is contended by opposing counsel, however, that the Curtis Bill provided only for the allotment of "the exclusive use and occupancy of the surface," etc., and that this did not carry to the allottee an

estate of inheritance. Without further argument we might rest on one answer, namely, the right of occupancy prior to the Curtis Bill descended to the heirs, the homestead being exempted from debt.

It would be monstrous to hold that after allotment the "exclusive use and occupancy" ended at death and left the wife and children mere squatters on the public domain, subject to the rapacity of thieves and rogues who may at once drive them out, plunder them of their home, and take possession for themselves.

The ten thousand Creeks who selected and accepted their allotments under the Curtis Bill, as well as Congress, understood that they were allottees. These ten thousand Creeks, practically two-thirds of the enrolled citizenship, certainly understood that the one hundred and sixty acres selected and allotted *was land and not blue sky*, and they believed and understood that the allotment was that many acres of land allotted to them. The Creeks knew nothing about the technicalities of the common law, and were wholly ignorant of the common law and statutory estates of the white man. It would be utterly absurd to attribute to the Creeks any understanding of the various estates, such as remainders, reversions, trusts, life estates and free-holds, and estates less than free-holds, and, yet, in *Choate v. Trapp*, 224 U. S. 665, this court quoted and approved the remark of Mr. Justice Davis in *Kansas Indians*,

5 Wall. 737, that "enlarged rules of construction are adopted in reference to Indian treaties," and also quoted the remarks of Chief Justice MARSHALL that "the language used in treaties with the Indians shall never be construed to their prejudice if words be made use of susceptible of a more extended meaning," and, likewise, quoted from *Jones v. Meehan*, 175 U. S. 1, to the same effect.

The fact that all the allotments made after April 1st, 1899, the date the Creek Land Office opened, were confirmed and ratified by Section 6 of the Original Creek Agreement, irrespective of whether the Curtis Bill allottee was dead or alive at the time the original agreement became effective, is the very strongest evidence that it was considered by all the parties that the heirs of dead Curtis Bill allottees inherited an interest, and, therefore, all the lands were allotted nunc pro tunc as of April 1st, 1899.

And in order to put the heirs of citizens who died after April 1st, 1899, before receiving an allotment on an equality with the heirs of Curtis Bill allottees who died prior to the ratification of the Original Agreement, section 28 was inserted into the Original Agreement authorizing an allotment to be made to the heirs of those who had not received an allotment under the Curtis Bill but who had died subsequent to April 1st, 1899.

No allotments were made prior to April 1st, 1899, and in order to put all citizens and their heirs

on an equality the tribal domain of the Creek Nation was to be allotted *nunc pro tunc* as of April 1st, 1899.

If a mere estate for the life of the allottee was all the Curtis Bill allottee received, then the tribal member had *less* after allotment than before. Section 11 of the Curtis Bill provides that "whenever it shall appear that any member of a tribe is in possession of lands, his *allotment* may be made out of the lands in his possession, including his home if the holder so desires." Now it is natural to presume that every citizen would select his allotment so as to include his home and cultivated lands. As we have shown, his farm, home and enclosures prior to the Curtis Bill, with his right of possession thereof, descended to his heirs, and on his death his widow and children would have the right of occupancy. The right of occupancy was just as sacred as the fee simple title and for all purposes the right of occupancy held in severalty was just as beneficial to the Indian as a fee simple title, and the purpose of allotting the lands was to bring about a distribution of the tribal property and a final dissolution of the tribe preparatory to statehood. According to the decision of the Oklahoma Supreme Court, upon the Curtis Bill allottee's death, his widow and children would have nothing. The argument may be advanced, however, that the widow and each child would also have a one-hundred-and-sixty-acre allotment, and we assume that the Oklahoma Supreme Court proceeded on the assumption that on the

death of the Curtis Bill allottee the widow and children would pick up the barn and out houses and orchard, fencing and other improvements, and move them over on to the widow's allotment, and on her death the oldest boy and the other children would pick up the dwelling, barn, out houses, well and other improvements and move them over on to the oldest boy's allotment. Certainly no such absurd construction should be placed upon the Curtis Bill. If that was the effect of the Curtis Bill, then Congress intended to destroy the permanency of their habitations and drive them to a nomadic and wandering existence.

It would indeed be a strange perversion of the policy of the United States in dealing with Indians to hold that Curtis Bill allottees had less after allotment than prior to allotment. Prior to the Curtis Bill, and prior to allotments, the rights of occupancy of the Creeks were descendible to their heirs. The citizens of these Five Civilized Tribes occupied the lands in severalty prior to any allotment act whatever, and their improvements and rights of occupancy descended to their heirs, and it certainly was not intended by Congress to allot them a mere life estate in the surface, and thus cut down their rights, rather than increase them. If the Curtis Bill allottee got nothing except a life estate, he got less than he had before any allotment, and if, upon his death, his family had to move on to one of their allotments, the long standing policy of the United

States was reversed, because such a scheme of allotment, giving them a mere life estate, would tend to make them nomadic, and wanderers, instead of permanent settlers.

Having shown that the title to the surface may be owned in fee by one party, and the title in fee to the minerals by another, it is unnecessary to discuss or cite authorities in support of our contention that an estate of inheritance can be created in the surface.

A base, qualified or determinable fee, as well as a fee tail, is an estate of inheritance. Any freehold estate for the life of another, or beyond the life of the holder, is an estate of inheritance.

—16 Cyc 602-4.

The Atoka Agreement with the Choctaws and the Chickasaws, executed prior to the Curtis Bill, and approved by that bill, under the caption, "Allotment of Lands," provides

"that all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes so far as possible a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands."

This contains no words of limitation, and does not say that the land shall be allotted to the Choctaws and the Chickasaws and their heirs.

In the second paragraph of the same section, the Atoka Agreement provides that

“all coal and asphalt in or under the lands allotted and reserved from allotment shall be reserved for the sole use of the members of the Choctaw and Chickasaw Tribes, exclusive of freedmen; *Porvided*, that where any coal or asphalt is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other lands and improvements, shall be ascertained under the direction of the Secretary of the Interior and paid to the allottee or owner of the land by the lessee or party operating the same, before operations begin.”

The ninth paragraph provides that

“all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale hereinbefore provided, shall be null and void.”

This section, under the head of “Members’ Titles to Lands,” provides that the chiefs of the Choctaw and Chickasaw Nations shall jointly execute, on behalf of the nations, patents to the allottees, conveying to the allottee all the right, title and interest of the Choctaws and Chickasaws in the land allotted “excepting all coal and asphalt in or under said land.”

Under the caption, “Town Sites,” and in the twelfth paragraph, it is provided that:

“It is agreed that all the coal and asphalt within the limits of the Choctaw and Chickasaw Nations shall remain and be the common property of the members of the Choctaw and Chickasaw tribes,” etc.

So far as we know, there has been no decision determining the quantum of estate passing to Choctaw and Chickasaw allottees under the Atoka Agreement, and, in fact, there can be none, for the reason that no allotments were made in these nations until after the Supplemental Agreement of 1902, and, in fact, none were made until after the opening of the Choctaw and Chickasaw Land Offices on April 15th, 1903.

The Original Agreement, however, made with the Seminoles, was executed on December 16th, 1897, and approved by the Act of Congress of July 1st, 1898 (30 St. L. 567). The Seminole Agreement is very much like the Curtis Bill, and has been construed by this court. The first paragraph, with respect to allotments to Seminoles, says:

“All lands belonging to the Seminole Tribe of Indians shall be divided into three classes,” etc. (for appraisement), “and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, *the location and fertility of the soil considered*; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him, during

the existence of the present tribal government, and until the members of said tribe shall become citizens of the United States."

The second paragraph provides:

"All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void."

The third paragraph provides that allottees may lease their allotments for not exceeding six years, upon blank forms furnished by the Tribal Government, requiring the same however to be approved by the Principal Chief and a copy filed in the office of the Clerk of the United States Court at Wewoka.

The fourth paragraph provides:

"No lease of any coal, mineral, coal oil, or natural gas within said nation shall be valid unless *made with the Tribal Government*, by and with the consent of the allottee and approved by the Secretary of the Interior."

The next paragraph provides:

"Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments," etc.

In the Indian Appropriation Act, approved April 21st, 1904 (33 St. L. 189), it was provided:

“And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed,” etc.

The question arose as to whether or not, under the above act, Seminole allottees not of Indian blood could alienate their allotments, it being contended by the United States, through the Department of Justice, that the Seminole allottees obtained nothing, prior to the issuance of patent, further than a mere right of occupancy; that they were not allottees of the land; and that the Seminole Agreement expressly provided for nothing further than a mere right of occupancy during the existence of the tribal government.

In *Goat v. United States*, 224 U. S. 458, 471, this court held that Seminole citizens obtained, upon the allotment, an estate of inheritance in the land, and that under the Act of April 21st, 1904, they possessed full authority, prior to the issuance of patent (the Seminole Government still being in existence) to alienate their equitable title. Speaking for the court, Mr. Justice HUGHES said:

“These adult grantors stood in precisely the same position—after the Act of 1904—as though they had received their allotments without any restriction upon their right to alienate

the interest thus acquired. It is insisted, however, that this interest was not of such a character as to be susceptible of transfer. This is not a tenable proposition. Stress is laid upon the provision in the Agreement of 1897 that each allottee should have '*the sole right of occupancy of the land so allotted to him.*' But it is not to be supposed that by this form of words Congress intended in the case of the Seminoles to provide that, by virtue of the allotment, the member of the tribe should receive an interest of a different nature from that received by allottees of other tribes. The lands were allotted to the members of the tribe in severalty, so that each should have his distinct portion. The allotments constituted their respective shares of the tribal property, set apart to them as such, and while the execution of the deeds was deferred, each had meanwhile a complete equitable interest in the land allotted to him. The nature of the allottee's interest is sufficiently shown by other provisions of the Agreement of 1897, as ratified by Congress, and by statutes in *pari materia*. In the agreement it was provided that any allottee might lease his allotment on certain conditions. With respect to the townsite of Wewoka, which was to be controlled and disposed of according to the provisions of the act of the General Council of the Seminole Nation of April 23, 1897, it was provided that on extinguishment of the tribal government deeds should issue 'to owners of lots' as in the case of allottees. *The interest of the allottee was a descendible interest.*

* * * * * *

"The inalienability of the allotted lands was not due to the *quality of the interest* of the

allottee, but to the express restriction imposed. Their equitable interest was one which, in the absence of restriction, they could convey. *Doe v. Wilson*, 23 How. 457; *Crews v. Burcham*, 1 Black. 352; *Barney v. Dolph*, 97 U. S. 652, 656; *Jones v. Meehan*, 175 U. S. 1, 16-18; *Godfrey v. Iowa Land & Trust Co.*, 21 Okla. 293, 95 Pac. Rep. 792; *Mullen v. United States*, April 15, 1912, *ante*, p. 448. And, hence, on the removal of the restrictions upon alienation, the adult allottees not of Indian blood were entitled to convey their surplus lands. So far as the bill assails such conveyances, it is without equity."

The restrictions in the Curtis Bill against alienation did not debase the quantity or quality of the estate granted.

—*Libby v. Clark*, 118 U. S. 250.

Section 5 of the General Allotment Act of 1887 (24 St. L. 388), provided that upon the approval of the allotments by the Secretary of the Interior the Secretary should issue patents to the allottees, which patents shall declare that the United States

"does and will hold the land thus allotted, for the period of twenty-five years, in trust for the *sole use and benefit* of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located," etc.

The preliminary patent provided for in the General Allotment Act of 1887 is a misnomer—it is, in effect, nothing more than a certificate of selection of allotment.

In the light of sections 15 and 16 of the Act of March 3rd, 1893 (27 St. L. 645), the Creek Nation as a political entity either by itself or in conjunction with the United States held the legal title to the lands allotted under the Curtis Bill in trust for the allottees. The *use* was in the individual Indian and the legal title in the trustees. The Statute of Uses had no application.

In *Beam v. United States*, 162 Fed. 260, the United States Circuit Court of Appeals for the Ninth Circuit had under consideration the General Allotment Act of '87, the question involved being, whether or not the heirs, where the allottee died prior to the twenty-five-year period, took the allotment by descent or purchase. Speaking for the court, Judge GILBERT said:

"It is true that by the Statute of 1887 the time for issuing the final patent may be deferred, and in fact may never arrive; but in the meantime it is clear that the allottee takes, under the first so-called patent, an estate in the land allotted to him. *He is given absolutely the sole and exclusive use and benefit of the land. Such a right acquired under the statute would, if the statute were silent on the subject of inheritance, descend, upon the death of the grantee, to his heirs.* The Indian tribes had their own rules and customs governing the descent of land (*Brown v. Steele*, 23 Kan. 672; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. ed. 49), and it must have been for the purpose of removing all doubt as to the succession, and establishing the more equitable rules of descent

and distribution adopted by state laws, that the provision was inserted that the so-called first patents should declare the trust for the benefit of the allottee, 'or, in case of his death, of his heirs according to the laws of the state or territory where such land is located'."

The court further said:

"The appellant compares the estate of the allottee before the final patent to that of a donation claimant before he had completed the settlement which entitled him to patent, and cites *Quinn v. Ladd*, 37 Or. 261, 59 Pac. 457, in which the court denied the right of the husband of a donation settler, who died before the expiration of the residence and cultivation required by law, to hold as tenant by the curtesy. *But the two cases are essentially different.* The settler under the donation law held only a possessory right in the land occupied, until the completion of the four years' residence and cultivation and full compliance with all the conditions of the donation land act. Until that time he had no grant and he acquired no estate. *Hall v. Russell*, 101 U. S. 503, 25 L. ed. 829. In the case of an Indian allottee there is a *present grant* from the time of the issuance of the first patent—an absolute grant of an estate in trust for the allottee, subject to no conditions to be complied with upon his part. The Indians were *not donees* of the government, and the allotment was not made as a mere act of its bounty. *It was an act of partition in severalty to individual Indians of lands the title to which the United States then and for many years had held in trust for the tribe.* It was an act which went into effect only upon the assent of the Indians. It was the ex-

pression of the more recent policy of the government, the purpose of which is to dissolve the tribal relation, establish the Indians in individual homes, in the possession of individual estates, ultimately to be vested in them in fee, to confer upon them the rights and impose upon them the duties of citizenship, and to make their tenure of real estate in all respects subject to the local law."

In *United States v. Park Land Company*, 188 Fed. 383, the court had under consideration the same question arising under the general allotment Act of '87. In that case the allottee died prior to the expiration of the trust patent of twenty-five years, and the court said: "I think it is an inheritable estate, governed by the law of descent and partition in the State of Minnesota."

See also *Hallowell v. Commons*, 210 Fed. 794 (8th C. C. A.)

In *Davis v. Williams*, 85 Tenn. 646, 4 S. W. 8, Mr. Justice LURTON, then a member of the Supreme Court of Tennessee, said:

"It is a cardinal principle of the law of real estate that a devise of the rents and profits, or the income of the land, is equivalent to a devise of the land itself."

See authorities there cited.

A case near in point seems to be *Gillett v. Gaffney*, 3 Colo. 351-361. Upon the organization of the Territorial Government of Colorado in 1861, the fee

to all the land within its borders was in the Federal Government. Settlers located upon farming lands, upon mining claims, and entered town lots, basing their sole claim upon occupancy. No titles had passed from the Federal Government and the question arose as to whether or not the right of exclusive occupancy acquired by possession was a descendible right, the title being in the United States. The situation there confronting the court was anomalous, and the court clearly held that the right of occupancy based on actual possession descended to the heirs of the occupant upon his death. The court said:

“Jarius Richardson died in January, 1865, leaving the complainants as his heirs at law. Prior to, and at the time of his demise, he was the co-partner of Hawley H. Gillett, whose administrator, widow and heirs are defendants. They pursued their partnership business in shops erected on the premises in controversy, which they occupied as tenants in common, under purchases and conveyances from one Curtis. During the co-occupancy, and at the time of Richardson's death, the fee was in the United States. In the May following the Denver town site was entered by the probate judge, in trust, under the Denver town site Act of May 28, 1864. Subsequently the premises were conveyed to Hawley H. Gillett and his brother George by the probate judge under circumstances hereafter more fully explained.

“The widow and heirs of Richardson file their bill to recover the undivided half of the premises.

“At the threshold they are met with the ob-

jection that their ancestor was not possessed of a descendible estate in the property to which they seek to establish their claim as his heirs.

"We do not understand the counsel for appellants seriously to question the character of an occupant's interest as property, but to challenge its character as real estate descending to the heirs. In view of the universality of titles by occupancy in our state the question is of deep interest.

"Upon the organization of the Territorial Government in 1861, the fee to the lands within its borders was in the general government. They were newly subjected to the dominion of man. Settlers located upon farming lands, upon mining claims and town lots, and claimed them in virtue of this occupancy. The general government by beneficent laws, provided for surveys, for homesteads and pre-emptions, for entry in person and in trust, all looking to the acquisition of the fee by the occupant, and placing it within easy reach. Having the fee in view, in many instances, large sums were invested, and not unfrequently, these claims and their improvements constituted the entire property of the occupant. Thus a new wealth was produced, and extensive and valuable interests grew up, springing out of, and attached inseparably to lands, and dependent entirely upon title by occupancy. It was the universal tenure by which lands were held and enjoyed. At common law, right of occupancy, strictly so called, was limited to the single instance, where a man was tenant *pur autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, in this case on the death of the tenant during the life of the *cestuy qui vie*

it did not descend, but he who first entered on the land might lawfully retain possession by right of occupancy, so long as the *cestuy qui vie* lived. 2 Black. Com. 258. There is nothing in the law of this right as it existed at common law, applicable to the right of occupancy as it is understood and exists here.

“Distinct from this, was title by possession, and where a mere naked possession, without apparent right, or shadow or pretense of right to hold or continue such possession, it was the lowest and most imperfect title known to the common law. The legal owner could put an end to the possession at any time by entry, but until some act was done by him to divest this possession, and assert his title, such actual possession was *prima facie* evidence of legal title in the possessor, and by lapse of time, and negligence of the owner, it ripened into a perfect title. If the disseizor or other wrong-doer died, possessed of the land, whereof he too became seized by his own unlawful act, the right of possession descended to the heir, and he could not be divested by entry, but only by action at law. 2 Black. Com. 195, 196.

“The deduction sought to be drawn by counsel for appellees, from this common law doctrine, in favor of the descendibility of the possessory rights of occupants, as they exist here, is not perhaps without force, reference being had to the character of the two estates. In the one case, possession was illegal, and there was ouster; in the other possession is legalized, and there is no ouster. The occupant becomes so, without any one having ceased to be so. These differences add to the character of the title we are considering, and place it on a higher

footing than that at common law. True, no lapse of time will give the occupant of any part of the public domain a perfect title as against the United States, and the possibility of a perfect title by lapse of time and neglect of the owner of the fee does not exist. The possibility of a perfect title, however, by consent and act of the owner does exist, in fact is made possible by the legislative will. Possibility of perfect title is replaced by legal right to acquire perfect title. Place the descendibility of the title of the disseisor at common law upon what ground you may, it is difficult to discover or imagine any plea for investing it with this quality, that would not equally, if not more strongly, apply to title as it exists here.

“It appears to us, however, that in the absence of statutory provisions, the descendibility of such estates might be placed on other and more satisfactory grounds. Feudal reasons have disappeared, and the peace, good order and stability of society, its prosperity secured by invoking the highest endeavors of its individual members by securing to them and their descendants the fruits of their labors; the superior claims of kindred, over strangers, founded on natural laws, are among the chief considerations upon which the laws of descent now exist. These considerations are as potent and imperative respecting the titles we are considering as they can be in the case of a fee. The common law has been adopted only in so far as it is applicable to existing conditions. Its rules, whether technical or otherwise, cannot be allowed to imperil great interests.

“In the case of the *Merced Mining Co. v. Fremont*, 7 Cal. 325, Mr. Justice BURNETT says:

‘The sentiment, that courts are bound to take judicial notice of the political and social condition of the country which they judicially rule, is as just as it is concise and appropriate; and courts knowing the social and political condition of the country, are equally bound to apply the rules of law and the principles of enlarged reason to the new circumstances of a people.’

“Where statutory provisions are wanting, we think these considerations would afford safe and tenable ground upon which the descendibility of these titles might be maintained and vindicated. *Beckett v. Silover*, 7 Cal. 229; *Merritt v. Judd*, 14 Id. 63; *Hughes v. Divillin*, 23 Id. 507; *Hale & Norcross G. & S. Mining Co. v. Story County*, 1 Nev. 106; *Coy v. Coy*, 15 Minn. 119.

* * * * *

“* * * We are unable to see any force in the argument that it descends as personalty. If it descends at all it is in and with the legal character which the law has given it.

“There is nothing in the law which obliterates its legal character upon demise, nor is there any thing that invests it with another and different character upon transmission to the heir. Upon the death of Richardson, therefore, his heirs became co-tenants with Hawley H. Gillett of the premises in question. They were tenants in common, for a joint tenancy can only be created by purchase, or act of the parties, and not by descent or act of the law. 1 Wash. R. P. 643, 645.”

Reverting to the purpose Congress had in mind in bringing about the allotment in severalty, under the Curtis Bill, there is one question which will not

down, namely: Did Congress intend, or contemplate, that the land allotted to a member of the tribe would, upon his death, revert to the tribe, and become a part of the unappropriated public domain in the sense that it was open to entry by any other citizen, or open to allotment by the Commission to any other citizens, to the entire exclusion of the heirs of the first allottee? Congress not only declared in the Curtis Bill that the Indians, upon the allotment of the lands, should become citizens of the United States, but evidently intended to encourage husbandry and the accumulation of property. In discussing the origin of property, and the breaking up of the communal ownership of ancient tribes, Blackstone (Cooley's Edition, Vol. 1, page 440, under the title "The Right of Inheritance") said:

"The right of inheritance, or descent to the children and relations of the deceased seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil right. It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society; it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of

his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections."

The conditions existing in the Creek Nation, prior to any allotment provided for in the Curtis Bill, were not wholly unlike those existing in the ancient days of Abraham and tribal communities holding their lands by common title.

It is well to carefully peruse the first chapter in the second book of Blackstone's Commentaries (Cooley's Edition, Vol. 1, p. 433) wherein the author discusses the origin of property, the breaking up of the communal ownership, and the final passage of title from the sovereign to the individual citizen.

Blackstone says:

"There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."

In pointing out that in the beginning of the world, we are informed by Holy Writ, that the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth," Blackstone says:

"The earth, therefore, and all things therein, are the general property of all mankind, ex-

clusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

“These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them had it been possible for mankind to have remained in a state of primeval simplicity; as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, all things were common and undivided, as if there were but one patrimony for them all. * * * Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he quitted the use or occupation of it, another might seize it without injustice.”

Discussing the steps finally leading to individual ownership, Blackstone says:

“Individual Ownership. But when mankind increased in number, craft, and ambition,

it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only a usufructuary property in them, which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, *that even the brute creation, to whom everything else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them.* Hence a property was very soon established in every man's house and homestall; which seem to have been originally mere temporary huts or movable cabins, suited to the design of providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive prop-

erty in the soil or ground was established. And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil; partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labor of the occupant, which bodily labor bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein."

"*Lands.* All this while the soil and pasture of the earth remained still in common as before, and open to every occupant; except perhaps in the neighborhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the East; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline of the Roman Empire. We have also a striking exam-

ple of the same kind in the history of Abraham and his nephew Lot. When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: 'Let there be no strife I pray thee, between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left.' This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not preoccupied by other tribes. 'And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered everywhere, even as the garden of the Lord. Then Lot chose him all the plain of Jordan, and journeyed east; and Abraham dwelt in the land of Canaan.'

"Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practiced as well by the Phoenicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert, uninhabited countries, it kept strictly within the limits of the law of nature, but how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a con-

duct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind.”

“*Property in Land.* As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit without encroaching upon former occupants; and by constantly occupying the same individual spots, the fruits of the earth were consumed, and the spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil than had hitherto been received and adopted. *It was clear that the earth would not produce fruits in sufficient quantities, without the assistance of tillage; but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art and labour?* Had not therefore a separate property in lands, as well as movables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas now (so graciously has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its rational faculties, as well as of exerting its natural. Necessity begat

property; and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants: states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science."

"Occupancy. The only question remaining is, how this property became actually vested: or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to every body, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands, that occupancy gave also the original right to the permanent property in the substance of the earth itself: which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a decree of bodily labour, is from a principle of natural justice, without any consent or

compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement. However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else."

"*Possession.* Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; for then it becomes, naturally speaking, *publici juris* (of public right) once more, and is liable to be again appropriated by the next occupant. So, if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary; and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this we may remember, is the doctrine of the law of England, with relation to treasure trove."

"*Transfer of Ownership.* But this method of one man's abandoning his property, and an-

other seizing the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. This mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance; which may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property: the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property: and Titius, being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

“The most universal and effectual way of abandoning property, is by the death of the oc-

cupant when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease of course. For naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society; for, then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. *But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation* (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, *in case he neglects to dispose of it*, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion. And further, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every

country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

“The right of inheritance, or descent to the children and relations of the deceased seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil right. It is true, that the transmission of one’s possessions to posterity has an evident tendency to make a man a good citizen and useful member of society: it sets the passions on the side of duty, and prompts man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate origin arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man’s children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They become therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore, also, in the earliest ages, on failure of children, a

man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring that 'since God had given him no seed, his steward Eliezer, one born in his house, was his heir'."

In chapter XIII, Blackstone's Second Book (Cooley's Edition, Vol. 1, page 593) the author says:

"Right of Possession. The next step to a good and perfect title is the right of possession, which may reside in one man, while the actual possession is not in himself, but in another. For if a man be disseized, or otherwise kept out of possession, by any of the means before mentioned, though the actual possession be lost, yet he has still remaining in him the right of possession; and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of that occupancy which he has so illegally gained. But this right of possession is of two sorts: an apparent right of possession, which may be defeated by proving a better; and an actual right of possession, which will stand the test against all opponents. *Thus if the disseisor, or other wrong-doer, dies possessed of the land whereof he so became seized by his own lawful act, and the same descends to his heir; now by common law the heir hath obtained an apparent right, though the actual right of possession resides in the person disseized; and it shall not be lawful for the person disseized to divest his apparent right by mere entry or other act of his own, but only by an action at law; for, until the contrary be proved by legal demonstration, the law will rather presume the right to reside in the heir, whose ancestor died*

seized, than in one who has no such presumptive evidence to urge in his own behalf."

In *Mooney v. Olsen*, 21 Kan. 691, the Supreme Court of Kansas held that the possession of real estate with the claim of ownership, is not only evidence of title, but is title itself in a low degree "and will descend to the heirs," and prior possession, with such a claim, will, even in ejectment, prevail over a subsequent possession acquired by mere entry without any lawful right.

The United States Circuit Court of Appeals for the Ninth Circuit, in *O'Connell v. Pinnacle Gold Mines Company*, 140 Fed. 854, citing the opinion of this court in *Billings v. Aspen Min. & Smelt. Co.*, 51 Fed. 338, held that the possessory right of the locator of a mining claim on the public domain of the United States, although the locator had not applied for a patent, descends to the heirs by inheritance, and does not pass to the heirs by purchase as donees of the government.

In *Bond v. Swearingen*, 1 Ohio 395, the court held that where a party locates and surveys lands under an act of Congress providing for a donation of lands to officers and soldiers of the Virginia line, and dies before patent, and the patent afterwards issues to his heirs, the heirs take by descent and not by purchase. In that case the court said:

"The entry of the ancestor, the warrant under which it was made, the survey had there-

on and the Acts of Congress regulating the appropriation of the land and the issuing of the patent are all referred to, and all show it was *not a gift by the government*, to the heirs of Massie, but that it was the execution of a trust in his favor so far as the same could be executed after his death, by transferring to his heirs the naked legal title to lands which he had fully appropriated and for which he was in his lifetime entitled to a patent. There is no pretense of any consideration moving from the heirs for the grant under which it is claimed they hold as purchasers; on the contrary the patent furnishes conclusive evidence that the consideration moved from the ancestor, that it was the services for which the warrant therein named issued, the location and survey in conformity to law, that caused the emanation of the patent. The ancestor had fully and legally appropriated the land. The naked legal title remained in the United States as trustee at the time of Massie's death, and his heirs procuring that legal title by virtue of the Act of Congress of 1790, vested in them no greater or other estate than their ancestor would have taken had the patent issued in his lifetime."

It was said in *Shelley's case*, 1 Rep. 98:

"When the heir takes anything which might have vested in the ancestor, the heir should be in by descent. Then, although it first vested in the heir, and never in the ancestor, yet the heir shall take it in the nature and course of descent."

In *Rice v. White*, 8 Ohio 216, the court held that land sold for taxes descends to the heir of the pur-

chaser, although at his decease he had not received his deed, but only a certificate of the sale.

Further :

It will no doubt be contended that the absence of any provision in the Curtis Bill for the subsequent issuance of patent to the allottee, proves it was the purpose to withhold all the title from the allottee except a mere possessory right for life. The Curtis Bill contains no provision whatever referring to a life estate. There is a total absence of any words, expressly or impliedly indicating that the possessory rights of the allottee entirely ended with his death. The failure to provide for the issuance of a patent, is neither conclusive nor presumptive evidence that the allottee's rights should be a mere life estate. Taking the provisions of the Curtis Bill in connection with section 15 of the Indian Appropriation Act of March 3rd, 1893 (27 St. L. 645), wherein the United States declared that "upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease," the allottee became vested, immediately upon the selection of the allotment, with an equitable estate of inheritance, and the issuance of a patent was unnecessary. In other words, upon the selection of the allotment the allottee became vested, under a legislative grant, by virtue of section 15 of the Appropriation Act of

March 3rd, 1893, and the provisions of the Curtis Act of 1898.

In *Shaw v. Kellogg*, 170 U. S. 313, 42 L. ed. 1050, this court had under consideration the provisions of an Act of Congress approved June 21, 1860 (12 St. L. 71), section 6 of which is as follows:

“*Sec. 6. And be it further enacted*, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided*, however, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.”

No provision for a patent was made in the act, or subsequent acts, operating on the title, at the time the point involved arose.

Mr. Justice BREWER quoted from *Winona & St. P. Railway Company v. Barney*, 113 U. S. 618, in reference to legislative grants, wherein the court said:

“They are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to

the language used, if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

Further, Mr. Justice BREWER said:

"But, it is said, no patent was issued in this case, and therefore the holding in the *Barden* case, that the issue of a patent puts an end to all questions, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. *There is no magic in the word 'patent'* or in the instrument which the word defines. By it the legal title passes, and when, by whatsoever instrument, and in whatsoever manner, that is accomplished, the same result follows as though a formal patent were issued. *Rutherford v. Greene's Heirs*, 15 U. S. 2 Wheat. 196, 206 (4:218, 221); *Bryan v. Forsyth*, 60 U. S. 19 How. 334 (15:674); *Langdeau v. Hanes*, 88 U. S. 21 Wall. 521, 530 (22:606, 609), in which this court said: 'If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated'."

In *Best v. Doe*, 18 Wall. 112, 21 L. ed. 805, this court had under consideration the treaty with the Chickasaw Indians of May 24th, 1834, which granted lands thereafter to be selected to certain reservees. The court said:

"Can it be doubted that it was the inten-

tion of both parties to the treaty to clothe the reservees with the full title? If it were not so there would have been some words of limitation indicating a contrary intention. Instead of this there is nothing to show that a further grant, or any additional evidence of title was contemplated. Nor was this necessary, for the treaty proceeded on the theory that a grant is as valid by a treaty as by an Act of Congress, and does not need a patent to perfect it. We conclude, therefore, that the treaty conferred the title to these reservations, which was complete when the locations were made to identify them. This was the view taken of this subject by the highest court of Mississippi soon after this treaty went into operation, in litigations which arose between the white race and the Indians themselves concerning the effect to be given to these reservations. In all these cases the Indian reservee was held to have preference over the subsequent patentee, on the ground that the United States had parted with the title by the treaty. * * * *Wray v. Doe*, 10 Sm. & M. 461; *Newman v. Doe*, 4 How. (Miss.) 555; *Niles v. Anderson*, 5 How. (Miss.) 365; *Coleman v. Doe*, 4 Sm. & M. 46.

* * * * *

“If, therefore, the location of the land in controversy was properly made, the legal title to it was consummated, and the subsequent patent was unauthorized. And this brings us to the consideration of the question whether the evidence on the subject of the location ought to have been received by the court.

“This evidence consists of the certificate of the Register of the Land Office at Pontotoc that the reserve of a Chickasaw Indian (naming him) was located on the disputed section in June,

1839, under the provisions of the 6th article of the Chickasaw Treaty, and a copy of the roll, number, reserve and location is given, showing this to be the case. It is insisted that this certificate did not go far enough; that it ought to have shown that a list, including this Indian, was furnished by the seven chiefs to the agent, and that the agent certified to the register and receiver, prior to the location, that he believed the list to be accurate. If this were so, no presumption could arise that local land offices, charged with the performance of a duty, had discharged it in conformity with law.

“It would be a hard rule to hold that the reservees under this treaty, in case of contest, were required to prove not only that the locations were made by the proper officers, but that the conditions on which these officers were authorized to act had been observed by them. Such a rule would impose a burden upon the reservees not contemplated by the treaty, and, of necessity, leave their titles in an unsettled state. *The treaty granted the land, but the location had to be fixed before the grant could become operative. After this was done, the estate became vested and the right to it perfect, as much so as if the grant had been directly executed to the reservee. It has been frequently held by this court that a grant raises a presumption that the incipient steps required to give it validity have been taken. Polk v. Wendell, 5 Wheat. 293; Bagnell v. Broderick, 13 Pet. 436.*

“*The grant in this case was complete when the location was made, and the location is, in itself, evidence that the directions of the treaty on the subject were observed, and it cannot be presumed that the officers empowered to make*

the location violated their duty. Even if the agent neglected to annex a proper certificate to the roll of Indians entitled to the reservations, it is difficult to see how the Indians could be prejudiced by this neglect. We conclude, therefore, that the certificate of the register was competent evidence, and if the locations were not as there stated, it is easy for the plaintiff below to show that fact. The same effect was given to a similar certificate of this same officer, by the High Court of Errors and Appeals of Mississippi, as early as 1848, in an action of ejectment brought by a Chickasaw Indian for a tract of land claimed by him in virtue of a location made in his behalf as a reservee, against a party claiming by patent subsequent in date to the location of his reservation. And this decision was re-affirmed by the same court in 1854, in the case of another Indian suing for his land under similar circumstances. It must have been supposed at the time by the losing parties that these decisions were correct, or else the opinion of this court would have been asked on the point involved. *Wray v. Doe (supra)*; *Hardin v. Ho-yo-po-Nubby*, 27 Miss. 567. After such a length of acquiescence, it would produce great mischief to hold this evidence to be incompetent."

In *Rutherford v. Greene's Heirs*, 2 Wheat. 197, Mr. Chief Justice MARSHALL had under consideration a North Carolina act granting 25,000 acres to Major-General Nathaniel Greene. In 1782 an act was passed for the relief of officers and soldiers in the continental line, section 8 providing for commissioners to lay off, in one or more tracts, the

land allotted to the officers and soldiers. Section 10 provides:

“Be it enacted, that 25,000 acres of land shall be allotted for and given to, Major-General Nathaniel Greene.”

The appellant contended that the act provided for a future grant, but created no such obligation on the part of the state, and did not convey any present interest to General Greene. The court held that it was a present grant, and operated to vest the title in General Greene immediately upon the location and survey of the 25,000 acres.

In *Wray v. Doe*, 10 Sm. & M. 452 (Miss.), the court had under consideration the sixth section of the Chickasaw Treaty which provided that

“reservations of a section each shall be granted to persons male and female, not being heads of families, who are of the age of twenty-one years and upwards, a list of whom, within a reasonable time, shall be made out by the seven persons hereinbefore mentioned, and filed with the agent, upon whose certificate of its believed accuracy, the register and receiver shall cause said reservations to be located upon lands fit for cultivation, but not to interfere with the settlement rights of others.”

The court held that immediately upon the selection the treaty operated as an absolute grant of the land described without the issuance of patent.

The Supreme Court of Mississippi again confirmed this holding in *Land v. Keirn*, 52 Miss. 341.

No stronger presentation of the question can be found than the opinion of Justice WILLIAMS, of the Supreme Court of Oklahoma, in *Godfrey v. Iowa Land and Trust Company*, 21 Okla. 293, 95 Pac. 792, which opinion was cited and approved by Mr. Justice HUGHES in *Goat v. United States*, 224 U. S. 470.

See also, *Doe v. Wilson*, 23 How. 457;
Crews v. Burcham, 1 Black 352;
Jones v. Meehan, 175 U. S. 1;
Francis v. Francis, 203 U. S. 233;
Thomason v. Wellman, 206 Fed. 896 (8th
C. C. A.).

Doctrine of Relation.

Section 6 of the Original Creek Agreement ratified the action of the United States in providing for the allotment, and ratified the action of the Dawes Commission in allotting the particular land, and the confirmation of the title operated by relation so as to, in contemplation of law, vest the title to all minerals as of the date of the selection of the allotment on May 18th, 1900, and the heirs obtained the title by descent and not by purchase.

Section 6 of said Original Agreement provides:

“All allotments made to Creek citizens by said Commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement.”

A confirmation is making firm what was before infirm. Confirmation is the approbation or consent to an estate already created which, as far as it is in the confirming power, makes it good and valid; so that confirmation does not regularly create the estate, yet such words may be mingled in the confirmation as may create or enlarge an estate, but that is by force of words foreign to the business of confirmation, and which by their own force and power tend to create the estate.

“A confirmation is the conveyance of an estate or right, that one hath in or unto lands or tenements, to another that hath possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is *increased or enlarged*.”

—2nd Words and Phrases, p. 1426.

Thus, in *Langdeau v. Hanes*, 21 Wall. 521, the Supreme Court of the United States said:

“A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant from the government.”

In *Langdeau v. Hanes*, *supra*, this court had under consideration the case where the land involved was formerly a part of the Northwestern Territory of Virginia. The land was in the possession of French and Canadian inhabitants of Vincennes, Indiana. When Virginia ceded the territory out of

which the State of Indiana was subsequently carved, Virginia required the United States to obligate themselves to confirm the French and Canadian inhabitants in their possession and titles. Virginia, by act of her Legislature of the 20th of October, 1793, authorized her delegates in Congress to execute a deed transferring her right, title and claim, as well of soil as of jurisdiction over the territory, providing:

“That the French and Canadian inhabitants and other settlers of the Kaskaskias, St. Vincents and the neighboring villages who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties.”

Among the claims presented and involved in that case was one on behalf of the heirs of Jean Baptiste Tongas for 204 acres, situated in the neighborhood of Vincennes. The United States Commissioners decided in favor of the heirs and confirmed their claim, and transmitted a transcript of their decision to the secretary of the treasury, by whom it was laid before Congress.

Mr. Justice FIELD, speaking for this court, said:

“This confirmation was the fulfillment of the condition stipulated in the deed of cession so far as the claimants were concerned. It was authoritative recognition by record of the ancient possession and title of their ancestor, and gave to them much assurance of the validity of

that possession and title as would be always respected by the courts of the country. The subsequent clause of the act providing for the issue of a patent to the claimants, when their claim was located and surveyed, took nothing from the force of the confirmation."

Speaking further in regard to the effect of the patent, the court held that it was merely documentary evidence of the title:

"But it would have added nothing to the force of the confirmation. The survey required for the patent was only to secure certainty of description in the instrument, and to inform the government of the quantity reserved to private parties from the domain ceded by Virginia."

In discussing the effect and significance of a legislative confirmation, Mr. Justice FIELD said:

"A legislative confirmation of a claim to land is a *recognition of the validity of such claim*, and operates as effectually as a grant or quit claim from the government. 'A confirmation,' says Sheppard in his Touchstone of Common Assurances, 'is the conveyance of an estate, or right, that one hath, in or unto lands or tenements, to another that hath the possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged.' P. 311. If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim

be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated.

"We do not understand that the ancient grant to Tongas was only of quantity, but understand that it was of a specific tract of 204 acres, and that the decision of the Commissioners in favor of the claimants had reference to a defined tract. If such were the fact, the title of the heirs was perfected, assuming that previously they had only an equitable interest, upon the passage of the confirmatory Act of 1807; if, however, the grant was of a certain quantity of land then undefined and incapable of identification, the title became perfect when the quantity was segregated by the survey made in 1820

"The plaintiff can, therefore, derive no aid from the patent issued in 1872. The doctrine which his counsel invokes, that the legislation of a state cannot defeat or impair the rights conferred by a patent of the United States in advance of its issue, is sound when properly applied, but it has no application here. There is no analogy between this case and the case of *Gibson v. Chouteau*, 13 Wall. 93 (80 U. S., XX, 534), and other cases cited by him. Here, in any view that may be taken, the title was perfected in the heirs of Tongas more than half a century before the patent issued, and for more than thirty years of that period the landlord of the defendant had been in the actual possession of the premises under claim and color of title made in good faith, and has during that time paid all the taxes legally assessed thereon. His possession has, therefore, ripened into a title, which, under the Statute of Illinois, is a bar to any adverse claim."

See also, *Landes v. Brant*, 10 How. 372, 13 L. ed. 459.

In *Goat v. United States*, 224 U. S. 459, this court held that the allottee of the exclusive use and occupancy, under the Seminole Agreement, obtained an equitable title, which, in the absence of restrictions, he could alienate, prior to the issuance of patent, and that the allottee acquired an estate of inheritance. The subsequent issuance of the patent merely conveyed the legal title, and operated, by the doctrine of relation, to vest the title as of the date the allotment was selected.

This court, in a number of cases, along with other courts, has held that the patent to a purchaser or donee of government land does not pass a new title, but is only the confirmation of a right which the donee or purchaser already had, as said by the court in *French's Lessees v. Spencer*, 21 How. 228,

“the patent for land, when issued, relates back to the entry and inures to the benefit of purchasers from the original beneficiary. The heirs of the grantor in such deed are estopped from setting up a legal title under the patent.”

In *Landes v. Brant*, 10 How. 372, this court held, in a case involving the validity of a sheriff's deed made under an executor's sale of land held by Spanish claimants, and before the issue of patent, that the imperfect title, as filed by the claimant, was subject to seizure and sale by execution, and that upon

the issuance of the patent by the government the legal title inured to the benefit of the purchaser under the sheriff's deed, although the sheriff's deed was in effect a mere quit claim. The court adopted the rule laid down by Cruise on Real Property, Vol. 5, p. 510, as follows:

"There is no rule better founded in law, reason, and convenience, than this: that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."

See also:

Cornelious v. Kissel, 128 U. S. 456-463;
Morrison v. Faulkner, 21 S. W. 984;
Rozell v. C. M. & L. Co., 98 S. W. 469;
Frost v. Missionary Society, 22 N. W. 203;
Stoddard v. Chambers, 2 Howard (U. S.)
284;
Bissell v. Penrose, 8 Howard (U. S.) 317;
Block v. Morrison, 20 S. W. 340;
Spiess v. Neuberg, 5 Am. St. Rep. 211;
Faull v. Cooks, 20 Am. St. Rep. 836;
Shepley v. Cowan, 91 U. S. 330-340;
Jackson v. Ramsey, (N. Y.) 3 Cowen 76;
Washburn Real Property, Vol. 3, Sec. 2034,
6th ed.;
Deffenback v. Howke, 115 U. S. 392, 29th
L. ed. 423;
Dibble v. Bellingham Bay Land Co., 163 U.
S. 65-68.

In *Ozark Land & Lumber Company v. Franks*,
57 S. W. 540, the Supreme Court of Missouri said:

“It has been uniformly held by this court that a purchaser at an execution sale acquires no title to real estate sold until the deed for it is executed by the proper officer, but, when executed, the deed of such officer, in so far as the defendant in the execution and his privies are concerned, and strangers purchasing with notice, relates back to the date of the sale, and vests the title in the execution purchaser from that time. *Alexander v. Merry*, 9 Mo. 514; *Strain v. Murphy*, 49 Mo. 337; *Porter v. Mariner*, 50 Mo. 364; *Leach v. Koenig*, 55 Mo. 451; *Boyd v. Ellis*, 107 Mo. 394, 18 S. W. 29. It is said that ‘relation is a fiction of law, resorted to for the promotion of justice, and for promoting the lawful intention of parties by giving effect to acts or instruments which without it would be invalid’.”

This court has fully considered the doctrine of relation in *United States v. Anderson*, 194 U. S. 395, 48 L. ed. 1035. The facts in that case are about as follows:

In December, '87, an agent of the State of Alabama, appointed for that purpose, selected certain lands in the indemnity limits in lieu of lands within the place limits, which had been lost to the grantee by sale or pre-emption. At the time of the selections, there was tendered to the proper land office all legal fees and charges. The selections were rejected by the local officers, and an appeal was taken to the Commissioner of the General Land Office. This appeal was not acted on for a good while, but, finally, in April, '96, the appeal was decided in favor

of the selections, and the selections were approved, and the title subsequently passed from the United States to the State of Alabama, in trust for its grantees. During the period intervening between the date the land was selected by the State of Alabama, and the date the selections were approved by the Secretary of the Interior, certain persons went upon the land selected, and removed therefrom valuable iron ore and lime rock. After the approval of the selections the United States brought a suit to recover damages from the trespassers, and obtained a judgment for Fifteen Thousand Dollars, which was paid into the treasury of the United States. The owners of the land claiming through the State of Alabama who obtained the rights subsequent to the selections of the land, asserted a claim to the benefits of the judgment recovered by the United States. The question involved was whether or not the claimants basing title through the State of Alabama, after the selections were made by the agent of the state, were entitled to share in the judgment obtained by the United States for damages on account of the extraction of minerals after the selections, but before they were approved by the Secretary.

This court went into the question very fully, and held that when the selections were finally approved, the title vested by relation as of the date of the original selections, and that, therefore, the claimants through the State of Alabama were entitled to the money collected by the United States in its

suit against the trespassers. This case is the strongest case we have found discussing the doctrine of relation.

According to its doctrine there can be no doubt that immediately upon the confirmation and ratification of these allotments, the whole title including the minerals will be considered by the doctrine of relation as having vested upon the date Agnes Hawes selected her allotment.

In *McAffee v. Lynch*, 26 Miss. 257, the High Court of Errors and Appeals of Mississippi had under consideration a case quite similar to this. Lynch filed a bill to vacate and set aside a land certificate issued by the proper land officer under the Act of Congress granting land for the relief of Jefferson College, and which certificate was issued to McAffee, on the 16th of August, 1834. Lynch claimed title to the land as assignee of one Leflore, a Choctaw Indian, to whom a half section of land *to be located* on any unoccupied land in the district in which he lived, was granted by the treaty of Dancing Rabbit Creek, on the 28th of September, 1830. Lynch had become the owner of this reservation of land as early as '32, and had applied to the locating agent for the purpose of locating the land in controversy under the reservation made to the Indian. The agent refused to make the location on the ground that he had not opened an office in that district. Leflore was registered as a reservee under the Dancing Rabbit Creek Treaty on the 19th of Oc-

tober, 1834, and his deed to the land confirmed by the location agent on that date. Leflore, however, had become the owner of this reservation as early as the year 1832, and had made his claim for location to the agent, who refused to make the location on the ground that he had not opened an office in that district. The court said:

“The effort is now made to show that the complainants’ title ought to relate back to this application, and upon this ground it is insisted that they have made out a claim for relief in a court of equity. If the doctrine of relation was not as well recognized in courts of law as in courts of equity, there might be great force in this position. But it is a doctrine equally recognized in both courts, ‘all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.’ 5 Cr. Dig. 511. The treaty in this case is the source of the Indian’s title, the location is intended to give identity to the land granted; the two together, the treaty and location, constitute the title. The treaty being the source of title, must be treated as the substantial part of the transaction, to which the title itself will have relation when completed by a location of the land.”

The court held that the complainant had the legal title and that his relief should be a suit at law, and not a bill in chancery. You will note, however, that the court invokes the doctrine of relation to carry the title back to the treaty.

This section 6 is not only a confirmation, but is also a ratification. It cured any infirmities in the title of Agnes Hawes, in so far as the United States was concerned, and operated as a ratification by the Creek Nation, the Creek tribe not having originally consented to the allotment of their land.

Mr. Story, in his work on Agency, section 244, says:

“A ratification, also, when fairly made, will have the same effect as an original authority has to bind a principle not only in regard to the agent himself, but in regard to third persons. * * * In short the act is treated throughout as if it were originally authorized by the principle, for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy.”

That section 6 not only ratified and confirmed all allotments made under the Curtis Bill, but also vested the title to all minerals, is clearly shown by section 41 of the Original Agreement whereby section 13 of the Curtis Bill is repealed, and declared to have no application in the Creek Nation. Section 13 of the Curtis Bill authorized the Secretary of the Interior to lease the lands for mineral purposes on behalf of the *tribe*.

In *Pickering v. Lomax*, 145 U. S. 310, 36 L. ed. 717, this court held that where land allotted to an Indian could not be conveyed without the consent of the President of the United States, the subse-

quent approval of the deed related back to the date of the deed. Mr. Justice Brown, in delivering the opinion, quoted with approval from *Cook v. Tullis*, 18 Wall. 332, as follows:

“The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification.”

In *Lykins v. McGrath*, 184 U. S. 170, 46 L. ed. 485, this court held that the consent of the Secretary of the Interior to a conveyance by an Indian patentee whose patent prohibited alienation by him or the heirs without the consent of the Secretary may be given after the death of the Indian grantor, and when so given the Secretary's consent is retroactive in its effect, and relates back to the date of conveyance, so as to cut off any claim of the heirs of such grantor to the land.

In *Bonifer v. Smith*, 166 Fed. 846, the United States Circuit Court of Appeals for the Ninth Circuit, had this question under consideration. In that case one Philomme Smith, a full-blood Indian and member of the Walla Walla band, married a white man by the name of Smith; they had three children; on April 1st, '91, the President of the United States, under the authority of the Act of Congress of March 3rd, 1885, caused the lands of the Umatilla Indian reservation to be allotted in severalty, and appointed Commissioners to make the allotment; Philomme

Smith settled upon and took actual possession of and made improvements upon the land in controversy; prior to her death she went before the Commissioners appointed by the President, and made selection of the land in controversy for herself and her children who were then minors; the Commissioners refused to allot said lands to said children, as requested, but allotted the same to other parties, which allotments were afterwards approved by the Secretary of the Interior, and trust patents issued. The wrongful allottees contended that the minor children at the time of their death were not entitled to have the lands allotted to them, which the mother selected for them during their lifetime. The law provided that selection for minors might be made by the parents. The question arose as to whether or not the heirs of the said deceased minor children inherited any interest in the lands which she selected for them prior to their death, and which the allotment commissioners refused to allot to them. The Court of Appeals said:

“But it is urged that the deceased children of Philomme had not at the time of their death an estate in the land which could be inherited. They died after the lands had been selected for them, and while their rights to the allotments were being contested in the Department of the Interior. If the selections so made by Philomme were prior in right to those of the appellants, and should have been allowed as made, equity will look upon that as done which ought to have been done, and will dispose of the rights of the

parties as if the allotments had been allowed when the selections were made.

“In *Lytle et al. v. State of Arkansas et al.*, 9 How. 314, 13 L. ed. 153, the court said:

‘It is a well-established principle that where an individual, in the possession of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect it.’

“This was said in a case in which a pre-emption right to government land was asserted, and the pre-emptor had done all that the law required him to do, but the land officers awarded the land to another. Several years thereafter the court, by a decree, awarded the land to the heirs of the original claimant. The doctrine of that case was affirmed in the *Yosemite Valley* case, 15 Wall. 77, 21 L. ed. 82. Considering, therefore, the rights of the parties as if the allotment had been allowed when the selections were made, there can be no question that upon such allotments the allottees acquired an estate of inheritance. This court has so held in the case of *Beam v. United States et al.*, (C. C. A.) 162 Fed. 260.”

This decision of the Court of Appeals for the Ninth Circuit recognizes and applies the old familiar equity maxim that “what ought to be done is considered in equity as done.” (Adams’ Equity 135, 6th Am. ed. p. 295.) Or, as said by Mr. Pomeroy, “Equity regards and treats that as done which in good conscience ought to be done.”

As heretofore pointed out, the lands of the

Creek Nation were to be allotted as of April 1st, 1899. In none of the agreements with the other tribes—the Cherokee, Seminole, and Choctaw-Chickasaw—was any provision made for the retroactive allotment of lands. The agreements with the other tribes made the allotment prospective—in *futuro*. The provisions in the agreements with the other tribes for allotments to the allottees confine all such allotments to heirs where the citizen was living at the date of the final ratification of the agreement, or at some future time died before getting his allotment. For instance, although the Cherokee Agreement was negotiated several months before it was ratified on August 7th, 1902, section 25 thereof provides that the roll of citizens shall be made as of September 1st, 1902, and the names of those living on that date to be enrolled, and section 20 provides for an allotment to the heirs where the citizen died after September 1st, 1902. Similar provision is made in the Choctaw-Chickasaw Supplemental Agreement.

In the Creek Nation, however, recognizing that over ten thousand allotments had already been made by the Commission under the Curtis Bill between April 1st, 1899, and the date of the signing of the Original Agreement, it was considered just and equitable by the Creek Nation and the United States to not only confirm and ratify all allotments made under the Curtis Bill, but to distribute all the other lands of the tribe as of April 1st, 1899.

It is, therefore, our contention that the Original Creek Agreement provided for a *nunc pro tunc* allotment and distribution of the tribal lands and property—that is, as of April 1st, 1899—and herein lies the distinction between the situation in the Creek Nation and the condition obtaining in the other tribes. The agreement with the Creeks was retroactive in operation—the agreements with the other tribes were purely prospective. There having been over nine thousand allotments made in the Creek Nation between April 1st, 1899, and the signing of the Original Agreement, it was but just and equitable that all allotments should be made as of that date, in order that the heirs of those citizens living April 1st, 1899, and who died before the ratification of the Original Agreement *without selecting an allotment*, would be placed on an equal basis with heirs of citizens receiving allotments during their lifetime, but who died prior to the Original Agreement. This whole scheme was but the recognition of the equity maxim that, equity regards and treats that as done which in good conscience ought to be done.

The Supreme Court of Alabama in *Johnson v. Collins*, 12 Ala. 322, held that the acquired right to enter land under the pre-emption laws of Congress, descended to the heirs at law, although the *occupant* died without performing the conditions imposed by the act. The court recognized and applied this equity maxim.

Again, the Supreme Court of Alabama, in *Atwood's Heirs v. Beck*, 21 Ala. 590, held that

“land warrants, authorizing the selection and location of certain amounts of land out of the unappropriated lands belonging to the Government of the United States, must be regarded as land, and pass to the heir at law, unless specifically devised. They cannot, so far as the rules of descent are concerned, be distinguished from bonds for title to real estate, which go to the heir, unless devised by the will.”

Point Four.

Chapter 49 of Mansfield's Digest of the Laws of Arkansas furnished the law of descent in this case.

If Agnes Hawes died seized and possessed of an equitable title to the allotment, the law of descent in force at the date of her death controls, and the question here presented is whether the Arkansas law or the Creek law of descent was then in force.

The agreed statement of facts shows that she died on June 29th, 1900.

The 31st section of the Act of Congress approved May 2nd, 1890 (26 Stat. L. 81) (Annotated Acts of Congress—Five Civilized Tribes, by Thomas, p. 9), “extended over and put in force in the Indian Territory, until Congress shall otherwise provide,” certain general laws of the State of Arkansas

in force at the close of the session of the general assembly for Arkansas for 1883, as published in the volume known as Mansfield's Digest of the Statutes of Arkansas "which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section," and among the Arkansas laws thus put in force is chapter 49 of Mansfield's Digest entitled "Descent and Distribution."

In the Indian Appropriation Act approved June 7th, 1897 (30 Stat. L. 83) (Annotated Acts of Congress--Five Civilized Tribes, by Thomas, p. 290), Congress further provided that "the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes:" Also, the Original Curtis Bill approved June 28th, 1898 (30 Stat. L. 495) (Five Civilized Tribes, by Thomas, p. 69), section 28 thereof, abolished from and after the 1st day of July, 1899, all the tribal courts and transferred all civil and criminal cases therein pending to the United States Courts, and by section 26 declared "That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the Courts of the United States in the Indian Territory." Thus it clearly appears, as held by the Indian Territory Court of Appeals in *Nivens v. Nivens*, 4th Ind. Ter. Rep. 30,

64 S. W. Rep. 604, that the Arkansas law of descent was the only law applicable to the devolution of the allotment at the time Agnes Hawes died on June 29th, 1900. *Nivens v. Nivens*, 4th Ind. Ter. Rep. 30, 64 S. W. Rep. 604; *Labadie v. Smith*, 41 Okla. 773, 140 Pac. 427; *Bartlett v. Okla Oil Co.*, 218 Fed. 384. Under the Arkansas law the husband was not an heir, and, therefore, the plaintiff cannot prevail in this case.

The only act putting in force the Creek law of descent for any period is the Original Creek Agreement ratified by Act of Congress approved March 1st, 1901, and ratified by the Creek Tribe on May 25th, 1901 (31 Stat. L. 861). Section 7 of the Original Creek Agreement put in force the Creek law of descent with respect to the homestead forty acres, and also section 28 provided that where a citizen was living on April 1st, 1899, and entitled to be enrolled under the Curtis Bill, the name of such citizen should be enrolled by the Commission "and if any such citizen has died since that time, or may hereafter die, *before receiving his allotment* of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly." Section 28 therefore only applies where the allotment is made to the heirs. (See *Skelton v. Dill*, decided by this court at this term.) And of course

Congress had the authority to name the heirs at any time it saw proper in a case where the heirs had not obtained a vested right preceding such act by actual inheritance. (See *Sizemore v. Brady*, 235 U. S. page 441). It is the contention of defendant in error that section 28 of the Original Creek Agreement prescribes the law of descent applicable in this case. That contention cannot possibly be sound because Agnes Hawes received her allotment during her lifetime, and whether she died seized and possessed of an estate of inheritance, or whether the allotment lapsed at her death and reverted to the tribe, is immaterial, because the allotment was not set apart to her heirs under section 28 of the Original Agreement, but was confirmed by section 6 of the Original Agreement, which operated as a ratification of all preceding allotments under the Curtis Bill, whether the allottee was dead or living at the time the Original Agreement became effective. And this was expressly held by the United States Circuit Court of Appeals for the Eighth Circuit in the recent case of *Welty v. Reed*. (See copy of the opinion in the appendix to this brief.) Section 28 only applies where the citizen died "*before receiving his allotment of lands and distributive share.*" Agnes Hawes having received her allotment preceding her death, the land in question was not allotted to her heirs under section 28, and we cannot therefore resort to section 28 as prescribing the law of de-

scent. This carries us back to section 7 of the Original Agreement, which is as follows:

“Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

“Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.

“The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation.”

This section prescribed a law of descent only so far as the homestead forty acres is concerned. There were no homesteads under the Curtis Bill of 1898, that act making no provision for the segregation of any part of the allotment as a homestead.

More than two-thirds of the citizens of the Creek Nation were allotted under the Curtis Bill, and no part of their respective allotments were impressed with any homestead characteristics until after the Original Agreement became operative. This condition did not exist in any of the other tribes. The allotment and homestead in all the other tribes were coeval and concurrent, the allottee being required to designate a certain fraction of his allotment as a homestead *at the time he selected his allotment*.

Thus, section 12 of the Supplemental Choctaw-Chickasaw Agreement ratified by Act of Congress approved July 1st, 1902 (32 Stat. L. 641), declared that "Each member of said tribes shall, *at the time of the selection of his allotment*, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres, etc."

Likewise, section 13 of the Cherokee Agreement approved by Act of Congress of July 1st, 1901 (32 Stat. L. 716), declared that "Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allotable lands, etc."

Likewise, the Seminole Agreement of 1897 (30 Stat. L. 567), declared that "each allottee shall designate a tract of forty acres, etc.," as a homestead.

In the Creek Nation, however, two-thirds of the citizens already had their allotments, and no part of their one hundred-and-sixty-acre allotments were impressed with any homestead characteristics at the time the allotments were made, and section 7 of the Original Agreement of necessity contemplated a reasonable time thereafter in which the allottee might appear before the Commission and select his homestead.

Homesteads were provided for the living and not the dead, and the Commission had no authority to arbitrarily segregate any part of the allotment as a homestead for the heirs. No part of the land allotted to heirs could be impressed with homestead characteristics. For a period of time between the selection of the allotment under the Curtis Bill and the actual designation of the homestead, the whole one hundred and sixty acres stood in the status of surplus, and acquired none of the characteristics of the forty-acre homestead.

See:

Mullen v. United States, 224 U. S. 448;

Hawkins v. Okla Oil Company, 195 Fed.
345.

Realizing that two-thirds of the Creeks would be required to select the forty acres as a homestead out of the existing allotments received under the

Curtis Bill, the Dawes Commission prepared blank forms for the selection and mailed them to each citizen, as shown by the following extract from the Ninth Annual Report of the Commission, 1902 (page 42):

“Paragraph 2 of section 7 of the Act of Congress, approved March 1, 1901 (31 Stat. L. 861), provides that:

‘Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have separate deed, conditioned as above; *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selections be not made for any citizen, it shall be the duty of said Commission to make selection for him.’

“To facilitate the making of these selections the Commission prepared a blank form which was mailed or delivered to each citizen of legal age and to the parents or guardians of all minors, upon which to designate the selections of homesteads.”

There can be no doubt that a Curtis Bill allottee surviving May 25th 1901, the date the original agreement became effective, certainly acquired by virtue of the confirmation of his allotment an estate of inheritance which on his death descended to his heirs.

Suppose, however, he had not selected a forty-acre homestead—what law of descent controlled the devolution?

Clearly section 28 of the Original Agreement would be inapplicable, because there the citizen had *received* his allotment under the Curtis Bill and it had been confirmed by section 6 of the Original Agreement and everything accomplished except the issuing of the patent. Now does section 7 of the Original Agreement apply the Creek law of descent? The only thing in regard to descent in section 7 of the Original Agreement appears in the third paragraph thereof, the whole section being as follows:

“Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

“Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in

the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.

“The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation.”

The third paragraph provides that “the homestead of each citizen (meaning the forty acres when selected) shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his *homestead* by will, free from limitation herein imposed, and *if* this be not done (that is, if he does not will the homestead), the *land* shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, *free from such limitation.*” Analyzing the paragraph, it provides that “if he have no such issue, then he may dispose of his *homestead by will*, free from limitation herein imposed (clearly meaning the twenty-one-year restriction imposed in the second paragraph of this section seven, or the five-year-restriction imposed in the first paragraph

of section seven with also the twenty-one-year restriction imposed in the second paragraph) and if this be not done, the land (clearly meaning the homestead) shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation," meaning that if he have no such issue and makes no will, the land, to-wit, the homestead forty acres, shall descend to his heirs according to the Creek law "free from such limitation," that is, free from the limitation against alienation of the homestead in the same sense that the phrase "free from limitation herein imposed" means when the allottee makes a will disposing of the homestead. If this be not the correct interpretation of the word "land" then the whole one hundred and sixty acres descends to the heirs free from all restrictions, although the first paragraph in the section expressly prohibits alienation by the allottee or heirs for five years.

Further analyzing—"if he have no such issue, then he may dispose of his homestead by will, etc., and if this be not done (if he make no will) the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation," which clearly conditions the application of the Creek law of descent upon the failure of the allottee to dispose of his homestead by will. Looking at it from that view, it clearly appears that if the allottee disposed of the forty-acre homestead by will, the Creek law of descent has no application. "If he have no such

issue" and makes no will of the homestead, the Creek law of descent applies, but if he makes a will, then the Creek law has no application. This construction clearly confines and limits the word "land" to the forty-acre homestead, because we need no law of descent where the allottee disposed of the homestead by will. But if the allottee made a will devising the homestead, the inquiry then arises as to what law of descent applies to the surplus one hundred and twenty acres, if the word "land" means the one hundred and sixty acres. This section is re-enacted into section 16 of the Supplemental Creek Agreement ratified August 8th, 1902 (32 Stat. L. 500), which clearly shows that the word "land" in the last paragraph of section 7 of the Original Agreement means the forty-acre homestead. Section 16 of the Supplemental Agreement is as follows:

"Lands allotted to citizens shall not in any manner whatever, or at any time be encumbered, taken or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

“Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who can not select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, *but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land EMBRACED IN HIS HOMESTEAD* shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.”

You will note that in the redraft shown in section 16 of the Supplemental Agreement the words “embraced in his homestead” immediately follow the word “land.”

The Oklahoma Supreme Court in *de Graffenried v. Iowa Land & Trust Company*, 20 Okla. 687, construed section 7 of the Original Agreement as applying the Creek law of descent to the whole one-hundred-and-sixty-acre allotment, but that opinion is illogical, and with proper deference to the court, we assert is unsound. The United States District

Court for the Eastern District of Oklahoma, in *Bartlett v. Okla Oil Company*, 218 Fed. 380-385, declined to follow the Oklahoma Supreme Court's construction of section 7 of the Original Agreement, and in construing the Original and Supplemental Agreements the Federal District Court said:

"By the amendment, the descent and distribution, to which the Creek law is applied in the original agreement, is made subject to the Arkansas law 'now in force in the Indian Territory.' But, as we have seen, the descent and distribution of lands other than homesteads—that is, surplus lands—was not especially provided for in the Original Agreement. Hence such lands are not affected by section 6 of the Supplemental Agreement. The descent of these surplus lands, not having been especially provided for in the agreements, was controlled by the laws of Arkansas in force in the Indian Territory, applicable to Indian estates by virtue of the Acts of June 7, 1897, and June 28, 1898, *supra*, and the amendment, effected by section 6 of the Supplemental Agreement, substituting the Arkansas law for the Creek law, in connection with the other legislation noted, had the effect of making the Arkansas law apply uniformly for the purpose of determining descent and distribution of Creek lands, alike in cases where the allottee died after receiving his allotment and in the case of heirs of a deceased member *who died before receiving his allotment*."

Suppose the allottee had not selected any homestead: then what law of descent controlled? The citizen had his allotment; selected it under the Cur-

tis Bill; it was approved and ratified by section 6, of the Original Agreement; he thereby became vested at least with an equitable title in fee, but had selected no homestead—no part of the one hundred and sixty acres was impressed with the homestead characteristics, and such being the case, what law of descent controlled when the allottee died after the ratification of the Original Agreement confirming his allotment, but before selecting a homestead? Some did die during that period—that is, between the ratification of the Original Agreement and before selecting a homestead, and it seems clear that the Arkansas law of descent controlled.

Homesteads were for the living, and if any part of the land ever became segregated as a homestead, such segregation as a homestead was made by a living allottee, and his heirs took by descent and not by purchase. There could be no such thing as a homestead passing to the heirs by purchase. The Commission had no authority to set apart a forty acres to the heirs as the homestead of the deceased.

This is an important question and ought to be settled, and will never be settled until this court decides it. In fact, no Indian question is settled in Oklahoma until decided by this court. No one feels secure or satisfied with any particular construction of these statutes until this court speaks, and the great importance of the questions appeal to this court for decision.

It seems clear that Curtis Bill allottees acquired an estate of inheritance exclusive of the minerals. Now the title to the minerals was acquired by section 6 of the Original Agreement, and if the allottee was dead at the time section 6 became effective as the ratification, then the question would arise as to whether the Creek law controlled the inheritance of the mineral rights and the Arkansas law controlled the inheritance of the title exclusive of the minerals. Our contention is that section 6 ratifying Curtis Bill allotments operates *by relation* so as to vest the entire title as of the date of the selection of the allotment under the Curtis Bill, and if this contention be correct then the Arkansas law nominated the heirs taking the surface rights, and also the mineral rights. If we be wrong in this, it clearly appears that the Arkansas law applies to the inheritance of the mineral rights as well as the surface, because the Original Agreement, section 7, does not put in force the Creek law of descent, except in a case of the actual inheritance of the forty-acre homestead, and where no homestead was ever selected or segregated, the Creek law had no field for operation. Of course if a homestead was selected, it must follow that the allottee survived the Original Agreement and the title to the minerals then united with the other title in one and the same person and when the allottee died he died seized and possessed of an equitable title in fee to both the minerals and the surface rights. That the heirs may take the land

exclusive of the minerals by actual descent and obtain the minerals by purchase is neither wonderful nor anomalous. Such a condition frequently occurs between individuals. One man may own the mineral rights and another the surface rights.

See *Hoilman v. Johnson*, 80 S. E. 249.

Assignments of Error.

We understand from opposing counsel that they will contend that the questions discussed in this brief are not included in the assignments of error.

The thirty-fifth rule of this court provides that "errors not assigned according to this rule will be disregarded, but the court at its option may notice a plain error not assigned." And, in *Wiborg v. United States*, 163 U. S. 658, this court said:

"And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

In *Clyatt v. United States*, 197 U. S. 222, this court said:

"While no motion or request was made that the jury be instructed to find for defendants, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet, *Wilborg v. United States*, 163 U. S. 632, justifies us in examining the question in case a plain error has been committed in a matter so important to the defendants."

In *Behn, Meyer & Company v. Campbell & Company*, 205 U. S. 409, this court said:

“In such cases alleged errors not stated in the assignment of errors filed with the petition for a writ have sometimes been considered. The limits of this practice are accordingly stated in the thirty-fifth rule of this court. There it is said that if errors are not assigned with the petition for the writ they will be disregarded, except that the court at its option may notice a plain error not thus assigned.”

However, it seems clear that the questions of descent discussed in this brief are raised in the first and third assignments of error to this court.

The first assignment (Rec., p. 4) is as follows:

“In holding and adjudging that under the evidence, agreed statement of facts, pleadings and laws of the United States relating to the allotment and disposition of the lands of the Muscogee, or Creek Tribe of Indians, and the descent and disposition of such lands after the death of an allottee of such lands, intestate, and without children or descendants of children surviving, and whose nearest relation of Creek citizenship being her mother, the said plaintiff, Peggie Woodward, and whose husband surviving, was a non-citizen of said Creek Nation; that said defendant in error had established title in fee simple to an undivided half of 160 acres of land, the subject matter of this action, under a deed of conveyance from the surviving husband of said allottee, who is a non-citizen of said tribe of Indians, and a right thereunder to a joint possession as tenant in common with said Peggie

Woodward of said land, contrary to an Act of Congress approved March 1, 1901, entitled 'an act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians, and for other purposes,' whereby said plaintiff in error, Peggie Woodward, was deprived of the title and right of possession, to an undivided one-half of said land, as she should have had and did have under said laws of the United States."

The third assignment (Rec., p. 5) alleges that the Oklahoma Supreme Court

"erred in holding and adjudging in this cause, under the agreed statement of facts, evidence, and laws of the United States, and especially under said Act of Congress, approved March 1, 1901, entitled 'an act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians and for other purposes,' notwithstanding the conceded facts that the land in controversy in this action was formerly a part of the public domain of the Creek Nation of Indians, and by the enrollment of Agnes Hawes, formerly Agnes Woodward, as a citizen of said Nation, she became and was entitled to have and receive an allotment of 160 acres of land out of said public domain, *as she might select or have selected, as provided by an Act of Congress adopted June 28, 1898, and that thereunder she did select as and for her allotment the said 160 acres of land, the sole subject matter of this action, prior to her death, which was on the 29th day of June, 1900, and that afterward a patent therefor was issued to the heirs of said allottee, without other description, April 1, 1904; that said allottee died intestate, without child or children, or de-*

scendants thereof, leaving a husband, Ratus Hawes, and her mother, said Peggie Woodward, plaintiff in error, an enrolled citizen of said Creek Nation of Indians, and her nearest relation of Creek citizenship, and her father, Lewis Woodward, a non-citizen of said Nation of Indians, now deceased, and the other co-plaintiffs in error as her nearest of kin; and notwithstanding the law of descent of the Creek Nation, as shown by the record in this case, and as interpreted and construed by the Act of Congress of June 30, 1902, entitled 'an act to ratify and confirm a supplemental agreement of the Creek Tribe of Indians and for other purposes,' providing for the descent of the lands of the Creek Nation and the tribal funds thereof should descend in the line of the Creek blood and Creek citizenship, the said Supreme Court of the State of Oklahoma adjudged that one-half of said allotment of said Agnes Hawes descended to said Ratus Hawes, non-citizen husband of said deceased allottee, and the other half to her mother, Peggie Woodward, plaintiff in error, the said defendant in error, Robert P. de Graffenried, being the grantee of said Ratus Hawes under a deed of warranty of June 22, 1904, wherefore, this plaintiff in error, Peggie Woodward, contrary to the facts and the law and especially the said Acts of Congress and laws of descent of said Creek Nation of Indians adopted by said Act of Congress of March 1, 1901, became and was deprived of an undivided one-half of said tract of 160 acres."

The Supreme Court of the state decided these questions and overruled the contention that the Arkansas law of descent controlled, and we insist that

the defendant in error, being the plaintiff in an ejectment suit, must sustain the burden of establishing title in himself, and under the admitted facts in this case it clearly appears that it would be a great injustice to sustain a recovery in his behalf in view of the fact that the record clearly discloses a total want of title in the defendant in error.

The fifth assignment of error is broad enough to cover all questions argued in this brief.

Plea of Res Adjudicata.

This question is clearly raised in the fourth assignment of error (Rec., p. 6) and we submit the following discussion on that point.

The opinion of the court below, appearing on page 81 of printed record, states—

“that no case has been found where a partition suit was ever brought on the law side of the docket in the State of Arkansas. The practice in the Indian Territory was to bring such suits on the equity side of the docket.”

This is a strong statement in support of our contention of the doctrine declared by Lord Eldon, one of England's greatest chancellors, cited on page 49 of our original brief, in the noted case of *Agar v. Fairfax*, 17 Ves. 533, 2 Leading Cases in Equity 374, where he says:

“This court issues the commission not under the authority of any act of Parliament, but on

the extreme difficulty attending the process of partition at law."

And see the other English authorities cited in same connection in the said brief. And this practice largely prevails in the states which keep the chancery and law procedures distinct. But it is now well settled that courts of law and courts of chancery have concurrent jurisdiction; the law jurisdiction, however, is not the old common-law procedure by writ of partition, but is a modified statutory provision in most, if not all, the states and territories of the Union. The United States has so enacted in the District of Columbia, and extended the Arkansas statutory procedure in partition over Indian Territory by Act of Congress, approved May 2, 1890, 26 S. L. 81, Sec. 31, which provides—

"that certain general laws of the State of Arkansas, in force at the close of the session of the General Assembly of that state, of 1883, as published in 1884, in the volume known as Mansfield's Digest of Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory, until Congress shall otherwise provide."

Then follows the names and numbers of chapters (not by section), among them the one named "Partition and Sale of Lands," comprising 33 sections. See Carter's Ind. Terry. Statutes, 1899.

It has been held by the Supreme Court of Arkansas long before the extending of this chapter over the Indian Territory that the statute was but "cumulative" as to partition.

The said adopted or "extended" chapter provides expressly that persons out of possession may bring suit for partition, and that all parties having or claiming to have an interest in the land sought to be partitioned should be made parties.

The statute may well be taken as a new and enlarged procedure for partition, as many of the states have provided by statute in cases where a person out of possession of land who claims an absolute title thereto as against an occupant who refuses to surrender possession, and denies the claimant's title, may bring suit, in the nature of a bill to quiet title, and this even on the equity side of the United States Courts, and have been sustained in this honorable court upon principles of equity, the same as did Lord Eldon in cases of partition, because of the difficulties and a want of a complete remedy in a court of law.

The case of *Organ v. Memphis & L. R. R. Co.*, 51 Ark. 238 (Nov. T., 1888), was brought upon the equity side of the court to recover damages for use and occupation of land for a railroad, and to quiet title thereto, and for possession. The point was raised in the trial court that there was an adequate and complete remedy at law, which was sustained,

and the bill was dismissed "without prejudice." Plaintiff appealed and the decree was reversed and case remanded upon the ground that the Statute of Arkansas provided for civil procedure under the code system, however, providing that the distinction between equity procedure and law procedure should remain, but that under the statute (which was one of the chapters extended as aforesaid over Indian Territory), the cause should have been transferred to the proper docket, and a failure to do so would not deprive the court of power to hear and determine the cause, as such silence and consent amounted to a waiver. (See the sections of the statute referred to on pages 46-47, original brief.)

In *Cribbs v. Walker*, 74 Ark. 104, the complaint alleged that one of the defendants, by her fraudulent act, took from the safe of plaintiff's ancestor a deed and filed it for record; is an equitable cause of action, though, incidentally, it asks relief of a legal nature, such as for the recovery of possession of partition of lands, wherefore the case was properly in a court of equity.

When a court of equity has no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered for that reason, and must expressly provide that it is made without prejudice, to the end that the plaintiff may resort to his action at law for any damage he may sustain if so advised.

Indian Land and Trust Co. v. Shoenfeldt, 135 Fed. 484, and authorities cited: Without such order

of dismissal, the presumption must be that the court tried the case on the merits.

In *Boyce's Ex. v. Grundy*, 210 U. S. . . . , a bill in equity was filed to rescind an agreement for the sale of land on the ground of fraudulent misrepresentations as to locality, liability to overflow, as to title and general description as to quality as to part of land not examined by purchaser.

Point made that court of law was competent to give relief and the court should refuse it upon the general principle contained in the Judiciary Act.

The court, by JOHNSON, J., says:

"This court has often been called upon to consider the 16th section of the Judiciary Act of 1789, and has as often, either expressly or by course of its decisions, held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

It was held by Chancellor Kent in *Menderhill v. Van Courtland*, 2 Johns. Chy. 369; *Livingston v. Livingston*, 4 Id. 290, where a defendant put in an answer instead of a demurrer and the cause came to be heard on the merits, that it was too late to object to the jurisdiction of the court on the ground that the plaintiff might have pursued his remedy at law.

Chancellor Walworth in *Grandin v. Le Roy*, 2 Paige 509, decides, to the same effect, "that after a defendant has put in an answer to a bill in chancery, submitting himself to the jurisdiction of the court, it is too late to insist that the complainant has a perfect remedy at law, unless the court is wholly incompetent to grant the relief sought by the bill." These cases are cited, quoted, and followed in the case of *Tyler v. Magwire*, 17 Wall. 288.

If a defendant answers and submits to the jurisdiction of the court, it is too late for him to object that complainant has an adequate remedy at law. *This rule belongs to that class of cases where the subject-matter of the bill belongs to that class over which a court of equity always takes jurisdiction*, as where a bill is filed to quiet title and remove a cloud arising from a claim under a sheriff's sale that is void, the claimant, being out of possession, has his remedy at law, but the objection as to the remedy comes too late upon appeal.

Stout v. Cook, 41 Ill. 447, citing 1 Daniels' Ch. Pr., 3d ed., 574, which last citation is (p. 576, Perkins' ed.):

"It must be recollected that courts of equity have assumed a concurrent jurisdiction with courts of law, as in cases of *accounts, partitions, and assignments of error* * * * in all such cases, therefore, a demurrer will not hold, on the ground that the subject-matter of the suit is within the jurisdiction of a court of law."

When a court of equity and a court of law have concurrent jurisdiction, the court which first acquires it will hold to the end.

In *Whitney v. Stevens*, 97 Ill. 82, the plaintiff brought action to recover possession from Stevens, who was occupying certain land under claim of title. Stevens filed bill in equity to enjoin from prosecuting the action for possession; *held* that the court of law having obtained jurisdiction by priority in point of time, even though the jurisdiction—or power to hear and determine the question of title—that is, have concurrent jurisdiction. Moreover, it is a serious question if the legislature has power to deprive the defendant of a jury trial under the constitution of the state, and the same under the Federal Constitution, if it were in a federal court.

In *Whiteside v. Haselton*, 110 U. S. 296, a suit in equity for partition of real property, the defendants denied the title of plaintiff, and set up by way of defense that the same had been adjudicated by a Tennessee court of chancery between same parties. The issue was as to the title to the property, and the court held that the defense was valid and plaintiff was concluded by the former suit. It was said by the court:

“Here was an issue raised between Mrs. Whiteside and Haselton as to the title to this property—the same issue and the same title now in question. It was necessary in that case that it should be decided, for if plaintiff had no title to

the land she had no right to recover, and the decree in her favor is that she had such title that it was paramount or superior to that of defendants, including Hazelton, and as by fraudulent confederacy of the lessees with Hazelton. The latter had possession. A decree for restoration was made. That such decree is, if the court had jurisdiction to enter it, which cannot be questioned, conclusive upon the parties before the court is not doubted. Until reversed, set aside, or annulled by some appropriate judicial proceeding it concludes Hazelton and his privies."

Hubbell v. U. S., 171 U. S., 203, was an appeal from the Court of Claims *dismissing* petition of Hubbell, a patentee of an "improvement in cartridges." The petition prayed for an account for all cartridges made or used by the United States, and when so made to have leave to make same a part of his petition covering the estimate.

The petition alleged that petitioner had pending in said Court of Claims a suit for compensation up to March 31, 1883; and the present suit is for compensation since said date, and for leave to make it a part of present petition when precisely ascertained by amendment. He claimed judgment for compensation \$110,000.

Upon the hearing of evidence (the pending case was 13793) the court found and adjudged that under the same state of facts therein stated, and between the same parties, the said No. 13793 was *res judicata*, notwithstanding a motion for new trial was

pending in said No. 13793, but which motion was overruled. The court, in this connection, states:

“Indeed, it may well be doubted whether the pendency of a motion for a new trial would interfere in any way with the operation of a judgment as an estoppel, citing *Harris v. Barnhart*, 97 Cal., 546; *Chase v. Jefferson*, 1 (Del.) Hons., 257; *Young v. Brehe*, 19 Nev., 379.

“And further * * * an application for appeal was filed by claimant, but as it was never allowed or perfected, and as it does not appear that a transcript of the record was ever filed in this court, it is obvious that the authorities which hold that an appeal perfected to a superior court vacates the judgment of the court below, have no application in this case.”

Defense of *res adjudicata* is sustained.

And the court further states:

“Whether the reasons given by the Court of Claims for the dismissal of this petition are correct or not; whether, *indeed, if this judgment* were right or wrong upon the facts presented, is of no importance here. If such judgment were based upon an erroneous view of the claimant's patent, it was his duty to have promptly taken an appeal to this court, where the whole case would have been reopened and the error of the Court of Claims, if such there was, would have been rectified.”

The point was made by appellant that the article in question in the case at bar was a different article from that in controversy in the other case. The answer of the Supreme Court was:

“The suit, however, was upon the same patent, and it was found by the Court of Claims to have been on the same facts, and we think the estoppel operates upon everything which was, if not upon everything which might have been, put in issue in the former case. The presumption is that the facts were the same, and if they were in fact different, it was incumbent upon the plaintiff to show that the prior case was decided upon questions not involved herein. We have before us only a decision upon the merits, and upon the same state of facts, upon a claim identical with this, and we perceive no reason why it should not operate as an estoppel.”

The said No. 13793 was heard below and taken upon appeal to the United States Supreme Court, and the decision therein appears in 179 U. S., 77, and gives the same result as the one in 171-203. A rehearing of the one in 171 was given, but was overruled, as noted on pages 86-179 U. S.

The principal case (171 U. S., 203)—

1. Judgment dismissing suit on findings is presumably upon merits.
2. Is a bar of another suit, same parties and same subject matter, though “upon a *different theory* of the case.”
3. Is no less a bar because motion for new trial adversely decided.
4. Not vacated by appeal never perfected.

Approved in Robinson v. American Car Co., 142 Fed. 170; *Allen v. Davenport*, 132 Fed., 221; 65 C.

C. A., 641; *S. Pac. R. Co.*, 133 Fed., 667; 66 C. C. A. 581.

In the last-named case the defendant in error brought suit to recover for pavement assessment, and pleaded a judgment of the Supreme Court of Iowa in a suit brought by them against the city to enjoin it from the prosecution of the work on the ground that the city had no power to make the assessment or collect for the making of the pavement. The said court did hold the contract void. The city brought suit against owners to make them refund the money paid, but under no legal obligation to pay, on the ground that the lot owners had received a benefit and should pay the amount of reasonable value enhanced by the work upon the property of the lot owners. It was claimed by the city that the statutes of Iowa provided for such payment. The United States Circuit Court of Appeals, Eighth Circuit, denied the proposition and proceeded to construe the statutes of Iowa under the light of certain cases offered and set forth in the opinion.

The question of *res adjudicata* was disposed of on the ground that the city in the case of the lot owners enjoined the collection of the assessment. The Federal court held that the proceeding by the lot owners was in effect to prevent a cloud being cast upon their title, without which they were not entitled to proceed in equity. And the fundamental question in that case was whether the defendants' property could be charged with the assessment. This

issue was decided in favor of the lot owners and against the city. Therefore it is a bar to the action now brought for the supposed *quantum meruit* the owners should pay for the assessment. This should have been pleaded in the said case, decided by the Iowa Supreme Court.

The case of *Southern Pacific Rwy. Co. v. U. S.*, 133 Pac., 667; 66 C. C. A., 581, holds that the finality of a decree of the district court confirming a Mexican grant of lands in California was not affected by a mere application for an appeal where the appeal was never perfected, but docketed and dismissed by the Supreme Court for that reason on the application of the complainant.

The same case: Where a bill presents a case in which it is competent for a court of equity to grant the relief sought, and it has jurisdiction of the subject matter, an objection to the jurisdiction on the ground *that there is an adequate remedy at law* must be taken by plea, demurrer or answer, *and is waived by answering to the merits.*

It is also decided that an application for appeal appeared to have been made and was granted, but no further step was taken for the appeal, and that an order of dismissal was obtained by the claimant in the United States Supreme Court, and it was held that such application could have no effect on the finality of the decree in the district court, citing in support *Hubbell v. U. S.*, *supra*.

The case of *Robinson v. American Car Co.*, 142 Fed., 170: A judgment or decree "without prejudice" never works an estoppel or *res adjudicata*, but when the same subject-matter between the same parties is brought in suit and the plea of estoppel is again interposed, on the ground that it was "dismissed for want of equity." The plaintiff set up new matter in his replication to the effect that defendant is using different wheels from those in question in the second suit. Says the court:

"On the remaining question, whether the decree in the second suit is *res adjudicata*, and prevents plaintiff from ever maintaining other suit for infringement of some patent against the same parties, there can be no question on the authorities. I feel absolutely obliged to so hold." Citing *Hubbell v. U. S. supra*; *Cromwell v. Sac. Co.*, 94 U. S., 353; *Burthe v. Dennis*, 133 U. S., 522.

In *Perego v. Dodge*, 136 U. S., 160, opinion by FULLER, C. J., states that the complaint in effect is a bill to quiet title as against an adverse claim. When a case is one of equitable jurisdiction *only* the trial court is not bound to submit issues of fact to a jury; and, if it does, it is at liberty to disregard the verdict and findings of the jury.

"And the plaintiff having voluntarily invoked the equity jurisdiction of the court, he is in no position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law, and such objection comes too late in the appellate tribunal."

Citing *Rynes v. Dumont*, 130 U. S., 354; *Kilburn v. Sunderland*, 130 U. S., 505; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530; *Coburn v. Cedar Valley Land Co.*, 138 U. S., 196.

The doctrine of the cases of *Lewis v. Cocks*, 23 Wall. 466, that if the court upon looking into the proofs found that *none at all of the matters* which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel. To the same effect is *Oelrichs v. Spain*, 15 Wall. 211. The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties; *but it by no means follows, when the subject matter belongs to the class over which a court of equity has jurisdiction*, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter cannot exercise discretion in the disposition of such objection.

—*Rynes v. Dumont*, 130 U. S. 395,
cited and followed in

Kilburn v. Sunderland, id., p. 515.

In *Brown v. Lake Superior Iron Co.*, 134 U. S. 536, quotes and approves the rule announced in 1 Daniels' Chy. Pr. 555, 4th, American ed., "that if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant

enters into his defense at large, the court, *having the general jurisdiction*, will exercise it;" see note on page 550: many cases cited to establish that "if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that is competent for the court to grant the relief sought, and that has jurisdiction of the subject matter."

In conclusion, we submit that the case of plaintiffs in error stands upon different ground from any case heretofore presented to this honorable court as to descent of a Creek allotment *received* before the act of March 1, 1901.

We furthermore say that, regardless of the correctness or incorrectness of the decree of the United States District Court of Indian Territory, it was an adjudication by the court upon the merits and estops the defendant in error to prosecute further.

And an equally meritorious branch of the case is the estoppel, as against public policy, of the *benefit* sought by defendant from act of Ratus Hawes in taking the life of the allottee of the land in dispute, which resulted in giving him supposed title to it.

It is immaterial as to the nature of the question presented to the court for determination, whether depending upon a federal, general or local law, if

it be within the issues made, if it is adjudicated by a court having jurisdiction of the parties and subject it binds the parties and their privies so long as the judgment remains unmodified and unreversed.

—*Mitchell v. Bank* 180 U. S. 471, citing
So. Pac. Rwy. v. U. S., 168 U. S. 1, 48;
Hopkins v. Lee, 6 Wheat. 109;
Smith v. Kernocher, 7 How. 198.

In general a judgment is a bar to a subsequent bill for the same purposes but upon the different ground that the land in question was excepted from the grant because it was part of Indian reservation. As to this the court said:

“In that case it was intimated that in general a judgment is a bar to a second attempt to reach the same result by a different *medium concludendi*.”

U. S. v. California and Oregon Land Co.
192 U. S. 355: see
U. S. v. Dalcour, 203 U. S. 423;
U. P. Rwy Co. v. Wyler, 158 id. 285;
U. S. v. Morcut, 123 id. 335.

In an equity suit the issues were made, but defendant failed to appear when case was called for trial whereupon a default was entered, and the court taking the case on the pleadings adjudged: “the equities are with defendant, that the bill be dismissed and defendant to recover costs to be taxed,” is a bar to another action or suit for the same thing.

—*Lyon v. Perin & Goff. Mfg. Co.*, 256 U. S. 608, citing

Durant v. Essex Co., 7 Wall 107, 110;
Biglow v. Windsor, 1 Gray 299;
Cooper's Eq. Pldg. and Story's id. sec. 793.

It has been held, however, that a court of review may go so far as to reverse a decree, to allow an unsuccessful party in the lower court to have his suit there dismissed without prejudice to prevent the bar and allowing him to try it upon the merits.

—*Miles v. Caldwell*, 2 Wall 45.

One of the tests to determine whether the matter or cause of action is the same as in the former suit, is that the same evidence will sustain both actions.

—*Chapman v. Smith*, 16 How. 133.

A plea of former adjudication was plead in bar. The decree was a general dismissal of the bill. Upon the hearing a special replication was filed by the plaintiff alleging that the court rendering the supposed judgment plead in bar was *coram non judice*, because there was no allegation or showing that there was a diverse citizenship, whereof the decree was void. *Held* by the Supreme Court of the United States, on appeal:

“But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account inferior courts, in the technical sense of those words, whose judgments taken alone are to be disregarded. If the jurisdiction

be not alleged in the proceedings their judgments and decrees *are erroneous*, and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities. This opinion was strongly intimated, if not decided, by this court in *Kemp's Lessees v. Kennedy*, 5 Cranch 185, and was afterward confirmed by the decision made in the case *Skillon's Executors v. May's Executors*, 6 Cranch 267. * * * We are therefore of the opinion that the decree of dismissal relied upon in this court *while it remains unreversed*, is a valid bar on the present suit as to the above defendants."

It is to be assumed that the defendant in error brought his case for partition in the United States Court for the Western District, in good faith, that he was a co-owner with the plaintiffs in error of the land in question, and sought to have his part, one-half, allotted to him in severalty, and to that end he alleged his source of title, and claimed that he was the legal owner in fee and entitled therefore, in equity and good conscience, to have and enjoy the same apart and free from the use and enjoyment of plaintiffs. His original complaint and amended complaint, being taken as one complaint, recited his ground for equitable, or say, legal relief, and as a test that the sole ground he had rested upon the identical state of facts, as set forth in said bill, as the case he now presents in this ejectment suit. He caused the defendants in the suit for partition to be brought into court by summons duly served, and they appeared and accepted his challenge and joined

issue by demurrer to his complaint, and denied that he had any ground for action, as we may say, either at law or in equity. All the facts he alleged were necessary and proper to entitle him to relief of any sort.

This issue involved the vital and absolutely necessary allegation of fact that he was the owner in fee and entitled to the present possession of an undivided half of the land. That was a condition precedent, before the court could proceed, whether at law or in equity, to take any step toward a partition of the land. It was a material issue, upon the *merits*. Neither side desired, nor could have had a jury trial, for an issue of law alone was presented, and we have shown, we think, that the court had jurisdiction—power and authority—to try suits in equity and actions at law, so it was but a question of form in this case, which docket the case was upon—law or equity, as under the law and practice, the proceeding for partition of real estate might be in equity or law—as the parties might elect. In this case they elected the equity side of the court, and willingly submitted their dispute to the decision of the court, which at least, was presumptively upon the merits. The complaint was dismissed by the court for want of equity. From this judgment this defendant appealed to the Court of Appeals of the Indian Territory, and the appeal was there dismissed and remanded without special direction. The presumption remains that the case was tried upon its merits. Moreover the

plea of former adjudication shows sufficiently that the merits were tried—that this defendant in error had not title, or right in the land in question, entitling him to partition, and therefore, the judgment rendered is beyond revival.

It may be true that the court, under the old chancery practice, could, upon its own motion, have dismissed the suit “without prejudice” or, as provided by the adopted Arkansas practice have transferred the case to the law docket, with leave to amend, but the failure of the court to do so could be only an irregularity, possibly sufficient to cause a reversal on appeal, but its judgment was not a nullity.

We respectfully submit to your honors that any one of the errors complained of herein, is sufficient to justify this honorable court in reversing the judgments of the courts below.

The old rule applies in the case at bar that the plaintiff must make out his legal title by the preponderance of the evidence.

Wherefore, plaintiffs in error pray judgment of this court that the decree of the Oklahoma Supreme Court be reversed and the cause remanded with proper directions.

WILLIAM R. LAWRENCE,
F. W. CLEMENTS,
GEO. S. RAMSEY,

Counsel for Plaintiffs in Error.



APPENDIX.

Opinion of United States Circuit Court of Appeals for the Eighth Circuit in *Welty v. Reed*.

UNITED STATES CIRCUIT COURT OF APPEALS.
Eighth Circuit.

No. 4057.—December Term, A. D. 1914.

EDWIN A WELTY, APPELLANT,
vs.
ANDREW REED, APPELLEE.

Appeal from the District Court of the United States
for the Eastern District of Oklahoma.

Mr. George S. Ramsey (Mr. Robert J. Boone, Mr. S. H. Lattimore and Mr. C. L. Thomas, were with him on the brief), for appellant.

Mr. Lewis C. Lawson filed a brief for appellee.

Mr. A. N. Frost and Mr. Robert Hardison, Special Assistants to the Attorney General, as *amici curiae*, and Mr. James B. Diggs, as *amicus curiae*, also filed briefs in support of contentions of appellant.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

Hook, Circuit Judge, delivered the opinion of the Court.

Reed sued Welty to quiet his title to land which had been allotted under laws relating to the Creek Nation of Indians. Both claimed under conveyances from heirs of Thomas Knight, a Creek citizen of the full blood. The question is whether the conveyance to Reed not having been approved by the Secretary of the Interior violated the restrictions against alienation imposed by Section 16 of the Act of June 30, 1902, c. 1323 (32 Stat. 500), commonly called the Supplemental Creek Agreement. It was made less than five years from the time the agreement became effective. So far as material the section is as follows:

“Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead in which this condition shall appear. * * * The homestead of each citizen shall remain after the death of the allottee for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will free from the limitation herein imposed, and if

this be not done the land embraced in his homestead shall descend to his heirs, free from such limitations, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

In *Skelton v. Dill* (decided Nov. 30, 1914) the Supreme Court held these restrictions applied only to allotments made to living Creek citizens in their own right, not to those made on behalf of deceased members of the tribe. Reed's original petition contained an averment that Thomas Knight died intestate before receiving his allotment, and after his death the land in controversy was allotted to his three children as his heirs. On demurrer the trial court held the pleading sufficient—that the restrictions against alienation did not apply. *Reed v. Welty*, 197 Fed. 419. This conclusion would be sustained by *Skelton v. Dill*; but afterwards Reed amended his petition and gave his case a different aspect. It appears from the amended petition that on May 18, 1900, while Thomas Knight was living, the commission to the Five Civilized Tribes set the land in controversy aside to him as an allotment; that a certificate of allotment of that date was duly issued to him; that he died intestate April 6, 1901, leaving as his heirs three children who were also on the rolls of Creek Citizens of the full blood; and that patents were thereafter duly issued to them.

The allotment to Thomas Knight was made by the commission under the Act of June 28, 1898, c. 517 (30 Stat. 495) known as the Curtis Act. This was

followed by the Act of March 1, 1901, c. 676 (31 Stat. 861), commonly called the Original Creek Agreement, which was not to be effective until ratified by the Creek Nation. As already stated, Thomas Knight died April 6, 1901. On May 25, 1901, the original agreement was ratified by the Creek Nation and thereafter patents were issued to the heirs. Section 6 of this agreement provides: "All allotments made to Creek citizens by said commission prior to the ratification of this agreement * * * are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein * * *". According to the amended petition the patents were issued direct to the heirs of Thomas Knight without reallocation of the land to them. It may be observed that section 7 of the original agreement contained restrictions against alienation similar to those of section 16 of the supplemental agreement; also that under the Curtis Act the lands allotted were non-transferable until after full title was acquired.

It is contended on behalf of Reed who prevailed below that Thomas Knight was not an allottee within the meaning of section 16 above quoted but that the land went direct to his heirs free from restrictions. It is urged that the allotment made to him under the Curtis Act gave merely an exclusive right of use and occupancy of the surface and not a legal or equitable estate susceptible of inheritance at death; also that as Thomas Knight died before the Original Creek Agreement became effective the allotment to him, such as it was, lapsed, there being no such thing as an allotment to a dead person, and therefore in his case there was nothing to confirm by section 6 of that agreement; and finally that the

execution of deeds direct to the children was equivalent to an allotment to them in his behalf. By the express terms of section 16 of the supplemental agreement the five-year restriction extended to the "allottee and his heirs." No exception was made of cases where heirs had also received or were entitled to allotments in their own right as citizens. It was quite probable that Creek citizens would secure by direct allotment to them and by inheritance from other allottees more land than needed or that non-citizens might become owners by inheritance, but the acts of Congress contemplated that whatever hardship the restriction on alienation would cause in such cases should be corrected if at all by the Secretary of the Interior who was authorized to relieve the restriction and approve conveyances. Though it might be clear that allottees should be allowed to sell inherited lands the terms and conditions of sale by those not greatly competent in such affairs were manifestly important, and control and supervision were wisely vested in the Secretary who could act according to the circumstances of each particular case. Thomas Knight received an allotment under the Curtis Act and was therefore an allottee. His allotment was in the class affirmatively designated as "allotments" by the confirmatory section of the original agreement. When that agreement took effect there were ten thousand or more of such allotments under the Curtis Act to approximately two-thirds of the total number of Creek citizens, covering the most thickly settled and improved lands of the nation. They were none the less allotments though the estate so evidenced did not embrace the underlying minerals added by the subsequent agreement. There is nothing in that agreement suggesting the need of a reallocation upon the death of an allottee. We also think the estate or right of such

an allottee was intended as inheritable. The plans for distribution of the Creek lands were the result of agreement between the Government and the Creek Nation. Whatever power Congress might otherwise have exercised, it chose to make the matter the subject of convention with the Indians rather than of pure legislation, and in construing the agreements regard should be had to the sense naturally conveyed to those principally to be affected. If under the agreements mere unexercised rights to allotment of lands and moneys were descendible or inheritable (see Sec. 28 original agreement and Secs. 7 and 8 supplemental agreement), there is no difficulty about a right that has been exercised. An allotment to a Creek citizen under the Curtis Act gave an interest or estate that would descend to his heirs at his death. (See *Goat v. United States*, 224 U. S. 458, 470). The subsequent patents to the heirs were a recognition of their inheritance of the allotted lands, not of an unexercised right. And that is the theory of the amended petition, though the argument was otherwise. After reciting the allotment to Thomas Knight, his death, the names of his heirs, the patents for the lands, etc., the pleading continues: "Said lands passed to said heirs in equal parts under and by virtue of the Original Creek Treaty * * *."

An argument is also made upon the provisions as to homesteads in section 16 of the supplemental agreement. The administrative construction was that the limitation discharged upon default of children born after May 25, 1901, was the limitation specially applicable to homesteads and not the general five year restriction against alienation by the "allottee or his heirs." However this may be, no selection of a homestead of 40 acres out of the 160 allotted to Thomas Knight appears to have been made and that fact cannot be employed to repeal the

general restriction as to the entire allotment. In this particular the case is unlike *Mullen v. United States*, 224 U. S. 448.

The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Filed February 3, 1915.

A true copy.

Attest:

(Seal)

JOHN D. JORDAN,
*Clerk U. S. Circuit Court of
Appeals, Eighth Circuit.*



APPENDIX.

Opinions of Supreme Court of the Creek Nation as of Record in Permanent Journals Kept by the Court: Now in the Custody of the Department of the Interior of the United States.

SUPREME COURT ROOM.

Dec. 5th, 1895.

Court convened as a new Court to organize it being the beginning of the Constitutional term. The newly elected Judges all present-

Judge John Reed was elected Chief Justice, *protem*- After taking his seat-he called the Court to order- and opened with prayer- The Judges John Goat- Thos Adams- Kellop Murrell were sworn in by Chief Justice. After which Judge Thomas Adams- Acting Chief Justice *Pro tem* administered the oath to John Reed, who was elected Chief Justice *pro tem*, to install Isparhecher- as Chief Executive of the Muscogee Nation- He installed the members of the house of Kings- Court adjourned to 1 o'clock - Court convened at 1 P. M. House of Kings notified the Court that the 1st & 2nd Chief was to receive the Oath of Office. The Court in a body (the Clerk bearing the Bible) repaired to the House of Kings- Where according to the law- the 1st and 2nd Chief were duly sworn in as Principal and Assistant Chief of the Muscogee Nation- After listening to the inaugural address, and in a body attending the reception of the Chief- they assembled in the Supreme Court room and organized permanently for business.

Judge T. J. Adams was elected Chief Justice for the Constitutional term, and took his seat. Mrs. Sue M. Rogers was elected Clerk and Jack Robertson, Caller for the Supreme Court for the Constitutional term and sworn in- Court being regularly organized- proceeded to business.

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the minute of the proceeding of Supreme Court of the Creek Nation on page 264 in the Minute Book of said Court, as on file in this office.

DEC 22 1913

C H D

J. G. WRIGHT,

Commissioner to the Five Civilized Tribes.

SUPREME COURT, MUSCOGEE NATION,

October 10, 1890.

CATHERINE BELLSTIDT

vs.

TOBE FRANKLIN &

TACKEY GRAYSON.

This suit was brought by Plff to set aside a sale of two houses and lots in the town of Muskogee, purchased by Defendants at that sale, which sale was made by virtue of an order from the District Judge of Coweta Dist. for the collection of a bond executed by Geo. Bellstidt, the son of Plff. upon which bond Plff. was one of the Assurities, A forfeiture was taken on said bond, and Geo. Bellstidt was re-arrested tried and acquitted.

The evidence in this case shows that this property belonged to Plff., that she lived in one of the houses, and that she notified the office making the

sale, in writing, with an itemized memorandum of her property, amounting to less than five hundred dollars, and that this notice was given before the sale was made. It is also in evidence that the sale was made on the 30th day of Aug.- 1890, and that this property brought only one hundred and eighteen dollars. The evidence further shows Mrs. Bellstidt, the Plaintiff in suit, to be a citizen of this Nation, and the head of a family.

Section 2 of an act approved June 21st, 1889, says "The personal property of any citizen of this Nation who is married or the head of a family, in specific articles to be selected by such citizen, not exceeding in value the sum of five hundred dollars, in addition to his or her wearing apparel, and that of his or her family; and also all house-hold or kitchen furniture, and all agricultural and horticultural general farming implements, shall be exempt from seizure on attachment, or sale on execution, or other process from any court on debt by contract. The Court construes this section as well as the other section of this act, to be a general Exemption law, with no exceptions only such as is mentioned in the first section, which says "that no property shall be exempt for debts contracted for the purchase money therefor, while in the hands of the vendee."

It is very evident to this court that our National Council intended by this law to shield the property of our citizens from every process of forcible seizure, when the same did not exceed the amount stipulated, which intent we cordially command, as an act of wise and patriotic legislation. Debts of all kinds, are simply the result of contracts mutually entered into between two or more parties.

A bond is as much the result of a contract as a debt- both are obligatory, and cannot be legally enforced against the obligor without a process from a court.

It is therefore the opinion of the Court that the property of a bondsman is exempt from seizure and sale, as much so as that for any character of debt. The Second Section of an act approved October 21st, 1881 page 128 of our new Digest, simply requires Dist. Judges to accept bonds of those arraigned on Criminal charges, when the assurities on such bonds shall swear that they are possessed of property to the full value of such bonds over and above all their personal liabilities. Judges are not compeled under this law to accept a bond untill the solvency of bondsmen are sworn to be equal to the amount of the bond over and above all liabilities. It is very plain that the liabilities of a bondsman whether for debt or other wise constitute a legal exemption from any forceable seizure authorized against the property of bondsmen. The act of June the 30th 1889 adds to such liabilities of bondsmen a further exemption of five hundred dollars worth of personal property which exemption Judges taking bonds must take judicial notice, and accept no bondsman who is not worth the amount of his assurance over and above all exemptions and liabilities thus recognized by law. *Improvements on our public domain are also exempt from any forceable seizure and sale for any character of Debt. Therefore Improvements on the public domain are regarded by this Court as specific articles of exemption not embraced as personal property, and must not be estimated as such, in testing the solvency of a bondsman. We regard this as a wise provision, as it protects our citizens in the possession of their homes and therefore is regarded by us as a homestead law. Other governments of superior intelligence have such laws for the protection of their citizens, and it is highly appropriated and wise we should extend such protection to our citizens. Officers of our government can not be too vigilant in protecting this sacred right to the citizen.*

Judges taking or accepting bonds should take judicial notice of all these exemptions, and reject any bondsman who does not swear that he or she is worth the full amount of the bond over and above those exemptions.

Judgment is therefore rendered for the Plaintiff in this suit- decreeing back to her the lawful possession of the property in controversy, and the Judge of Muskogee District is hereby directed to protect her in the peaceable possession of the same against any interference on the part of the Defendants herein, or their Agent.

S. B. CALLAHAN,
Clk.

G. W. STIDHAM,
Chief Justice,
M. N.

This opinion is agreed to by judges G. W. Stidham, Wm. Jones and Hardy Stidham and discented to by Judges John Reed and Isparhecher.

S. B. Callahan, Clk.

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on pages 105, 106 and 107 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT

Aug. 5th, 1896.

HON. JAMES COLBERT

Pres. Citizenship Commission

SIR: Your communication of July 22nd, 1896, asking the opinion of this Court on the following question, has been received to wit:

"We would respectfully request you to render an opinion upon the Constitutionality of an act of the National Council, approved Oct. 26th, 1889, found on page 105, compiled laws of the M- N- Edition 1893, at as early date as possible."

In answer hereto the Court is of the opinion that this act is not inconsistent with the legislative functions of our council. It is only remedial in character, and not retroactive. There cannot be any question, as to the Constitutional authority of Council to enact any law of a remedial nature.

It only closes the door of our Nation after a lapse of nearly seventy years. All persons having citizenship rights in our Nation have certainly been afforded ample time, and opportunity to ask for them. No Indian, who loves his race, would remain out of his country for twenty-one years unless debarred from exercising his freedom- and it is equally true that if he has thus remained away, he *has* selected a home of his own choice with no intention of leaving it. It is certainly in the province of the tribal Council to close its door after wating the pleasure of these absentees for fifty years. The evident purpose of this law is simply to exclude from our Nation all persons who have never placed their foot on our soil, even though they should be full blood Creeks and the Court so construes the meaning.

Very Respectfully,

SUE M. ROGERS,
Clerk.

T. J. ADAMS,
Chief Justice.

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the declajon

of the Supreme Court of the Muskogee as same appears on page 286 and 287 of the Minute Book for said Court, as on file in this office.

DEC 22 1913

C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT

Case No. 143.

June 16th, 1896.

BILL McINTOSH

JULIA GREEN

vs.

BILL WILLIAM

This is a suit for the recovery of a part of the estate of Danial Williams, as heirs thereof- consisting of one farm and homestead- thirty head of hogs and other property, scheduled as per appraisement- and also the property of Julia Green's mother, consisting of thirteen head of stock cattle, valued at five hundred dollars.

This case appears from the Docket to have been instituted Oct. 1st, 1894, and on June 8th, 1895, judgment rendered by Default for Plffs- Application was made by Deft. for a re-opening of of the case, and on June 13th,- application was granted and the case set for re-hearing Oct term 1895- continued to Nov 1895- and continued to June 1896- June term 1896- case called day after day- Plffs reporting ready- Deft not present- Evidence was submitted to the Court by Plffs- After due consideration of the facts in the case- judgment therefore is rendered for Plffs in suit - decreeing to them the lawful possession of the property in controversy- And the Judge of Muskogee Dist- is hereby ordered to place the Plffs in possession and protect them in peaceable possession of the same.

SUE M. ROGERS
Clerk.

THOS. J. ADAMS,
Chief Justice,
M. N.

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on Page 276 in the Minute Book of said Court, as on file in this office.

DEC 22 1913

C H D

J. G. WRIGHT,

Commissioner to the Five Civilized Tribes.

SUPREME COURT

Case 161

June 18th, 1896.

MRS. E. E. WELDON

vs.

MRS. PATTY OVERTON.

This case is for the recovery of fifty acres of land near Wagoner, I. T.- valued at Five (\$500.00) Hundred Dollars and damages, Three (\$300.00) hundred dollars.

A careful and thorough investigation of the evidence brought to bear in the case, shows that the peice of land in controversy, was public domain, and that the Deft Mrs. Patty Overton was the first to make improvements thereon-

It is therefore the opinion of the court, that the Deft Mrs. Patty Overton has the legal right of occupancy, and judgment is hereby rendered in her favor.

J. H. LYNCH
Clerk.

THOS. J. ADAMS,
Chief Justice,
M. N.

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the

Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 279 of the Minute Book for said Court, as on file in this office.

DEC 22 1913

C H D

J. G. WRIGHT,

Commissioner to the Five Civilized Tribes.

SUPREME COURT

Nov. 30th, 1891.

M. B. JONES

vs.

ROBINSON ROBERTS &

GEORGE ROBERTS

This is suit for the recovery of a farm valued at three hundred dollars.

The testimony in this case discloses the fact that these defendants sold to Plff. a certain farm for three hundred dollars and received payments thereon at different times amounting to one hundred and thirty nine dollars and fifty cents; forty four dollars and fifty cents of which amount has been returned to Plff. and now under his control. It is also shown that no definite time was designated when final payment for said farm should be made; and that Defts. before demanding final payment therefor, nor without the knowledge or consent of Plff. sold said farm to another party, and then returned to Plff. forty four dollars and fifty cents. It is also shown that the farm in controversy belong to Robinson Roberts one of these Defts. who is now dead, and who is the son of Geo. Roberts, the other Deft. At the time this sale was made to Plff. both these Defts. were present and both acted jointly in receiving the payments for said farm.

It is the opinion of the Court that the sale of said farm to Plff. was a valid sale and his posses-

sion and control therefore could not be disturbed by any subsequent sale made by either of these Defts. The only remedy these Defts. had against Plff. for the return of this farm to them, was only a failure of payment, for every species of property sold must stand good for the purchase money until fully paid for. It appears that Plff. still owes Deft. a balance of two hundred and five dollars on said farm.

It is therefore ordered and decreed by the Court that Plff. have and hold said farm and shall have until the first day of May 1892 to pay Deft. the balance due on said farm which balance he may pay in cash or in cattle and horses at a fair Cash valuation.

M. L. CHECOTE
Clk.

S. B. CALLAHAN,
Chief Justice.

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on pages 150 and 151 in the Minute Book of said Court, as on file in this office.

DEC 22 1913

C H D

J. G. WRIGHT,

Commissioner to the Five Civilized Tribes.

Okmulgee I. T.

DOCTOR WILLINGHAM

vs.

YARKENHA (*et al*).

This suit is for the recovery of an estate of John Willingham (Decease) which was appraised by Judge March Thompson of Enfaula Dist- And was divided into two equal parties, one half of which was given to one Doctor Willingham (In the eyes of

the law) the true heir- which requires the nearest blood relation.

The evidence in the case shows that at the time of the death of John Willingham- There were two heirs, a son and a daughter, but before the estate was properly appraise, and given to the two heirs, the daughter died and only the son, remain as the true heir to the estate, But the evidence in the case shows that half of the property was given to three different person's who are not heirs to the estate, on a suppose ruling of the Supreme Court- which is not on record. There is no law or ruling on record, that would take from the true heir any part of the estate- Unless it be for honest debt. Therefore the opinion, and decission of this court is that the action of the judge of Eufaula Dist. be and is hereby reverse, and the Judge be instructed to turn the property over to Doctor Willingham the true heir- by its light- horse men. Done this the 11th day of June, 1893.

J. H. LAND
Clk.

WM. F. McINTOSH,
Chief Justice.

M-N

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 181 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT OF MUSKOGEE NATION.

Okmulgee, I. T. Nov. 3rd, 1894

LIDIA CHILDERS

vs.

NANCY DREW

This is a cause wherein Lidia Childers is the Plaintiff and Nancy Drew is the Def'd'nt. The cause of action being for the recovery of a farm and improvements, now in possession of the def'd'nt under lease to certain non-citizens.

The court herein decides, that in the absents of any showing on the part of said Nancy Drew and she (Nancy Drew) failing to answer the complaints of said Lidia Childers, that the said farm and improvements are the property of Lidia Childers and it is so declared.

In testamony whereof I hereunto fix the seal of this court and my Official signature.

O. A. MORTON

Clk.

W. F. McINTOSH,

Chief Justice M N

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 241 in the Minute Book of said Court, as on file in this office.

DEC 22 1913

C H D

J. G. WRIGHT,

Commissioner to the Five Civilized Tribes.

SUPREME COURT

Dec. 2nd, 1891.

ELSIE COBB

vs.

R. R. BRUNER

This is a suit for the recovery of a debt of 408 dollars.

The evidence in this case shows that Plff purchased a farm from Deft. for one hundred and fifty dollars and executed a note for the same, on which note payment had been made to the amount of thirty eight dollars, when said farm was taken from Plff by law. It also appears that all the rails and other articles placed on said farm by Plff. have been removed therefrom by Plff.

It is therefore the opinion of the Court that the amount involved in this case does not reach one hundred dollars; and therefore not within the jurisdiction of this court. The case is therefore dismissed from the docket.

M. L. CHECOTE
Clk.

SAML. B. CALLAHAN,
Chief Justice.

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 149 in the Minute Book of said Court, as on file in this office.

DEC 22 1913

C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

WM. McINTOSH

AND

JULIA GREEN

VS.

BELL WILLIAMS

This is a suit for the recovery of the following property as part of the effects of the estate of Daniel Williams as the heirs thereof, to wit; One farm and homestead, thirty head of hogs, and other property as scheduled for appraisalment, and also the property of Julia Green's mother's estate consisting of thirteen head of stock cattle valued at five hundred dollars. This case appears from the docket to have been instituted October 1st 1894. The facts herein are that on June the 8th 1895 Plffs. and Deft was called for announcement, when Plffs. announced ready for trial, but Deft appeared not, whereupon Plffs submitted to the court their evidence and upon hearing hereof, the Court rendered Judgment for Plffs by default.

W. F. McINTOSH,
Chief Justice.

M N

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahama.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 246 in the Minute Book of said Court, as on file in this office.

DEC 22 1913

C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

June 10th

Court met pursuant to adjournment at 9 A M

Present all the Judges. Court opened with prayer by the Chaplain. Minutes of yesterday read and approved. The case of Lydia Childers vs. Niccy Drew was taken up for trial and after the testimony was submitted and argument of Council heard the Court rendered judgment for the Plff as follows, June 12th 1895.

This is a suit for the recovery of a farm and improvements, comprising about 65 acres of land valued at \$250.00 dollars.

It appears from the evidence that Plff bought an improvement consisting of a house and a field of 20 acres of land, also included in said purchase a piece of uncultivated land adjoining to said field, around which her vendor had plowed some furrows, and obtained the consent of the owner of two strings of fence bordering thereto to join fence with them, and that she paid the purchase money as alledged.

It is also shown that Deft is in possession of said uncultivated land by virtue of a seven year lease with a noncitizen and by no other right.

It is held by the Court that unimproved land adjoining to an improvement cannot be taken by other than the owner of such improvement, or by the consent of such owner. It is also held that furrows stakes or any other marks of designation showing the meets and bounds of unimproved land adjoining an improvement, is sufficient evidence to establish the intent of a citizen to use said land for individual purposes, and vests in such citizen constructive possession thereof, provided such marks of designation shall embrace a reasonable quantity of land for farming purposes only.

It is further held that possession of land in this

Nation by a noncitizen is illegal and void, unless such possession shall be by virtue of rental contract for a period not to exceed one year.

It is therefore the opinion of the court that Plff herein is entitled to the lands in controversy and the Court so decrees.

S. B. CALLAHAN
Clerk

W. F. McINTOSH,
Chief Justice.

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on pages 247 and 248 in the Minute Book of said Court, as on file in this office.

DEC 22 1913

C H D

J. G. WRIGHT,

Commissioner to the Five Civilized Tribes.

MUSKOGEE NATION

vs.

G. W. GRAYSON

This is a cause wherein the defendant G. W. Grayson was sued in this court at its last June term, by the Muskogee Nation represented by A. P. McKellop, and others for the recovery of \$1276.75- money of which the national safe was robbed over ten years ago, when defendant was treasurer of the Nation- It is urged by counsel for the Nation that under act of Nov. 3rd, 1893 Defendant is liable and indebted to the Nation in the sum of the amount stolen- namely \$1276.75 with interest to date, and this Court is prayed to render judgment to that effect. The Defendant G. W. Grayson denies that he is now, or ever was indebted to the nation in the amount claimed, and avers that there is no founda-

tion either in law or facts on which to predicate said claim against him.

The cause was fully discussed by Council and submitted to this Court.

The associate Justices divided equally on the question and it finally rested with the Chief Justice to decide. In order to give myself ample time for a fair and full consideration of the subject thus left to me, I postponed final action until the present session.

Now the cause is one upon which much time and attention has been bestowed and further, elaboration is unnecessary. Sufficient it is to say that the act of Nov. 3'93 clearly intends and propooses to take effect upon a thing that occurred many years before its enactment; upon this point there can be no controversy and upon this point the Constitution is equally clear and leaves no room for misconstruction. Article 8 and 2 reads as follows: No laws taking effect upon things that occurred before the enactment of the laws shall be passed; In this case the occurrence took place over ten years ago while the law under which action is brought was only enacted Nov. 3rd, 1893. With these lights before me the conclusion is forced that the said act of Nov. 3rd 1893 is unconstitutional null and void. There being therefore no warrant in law for action in this case. The cause of the Muskogee Nation against G. W. Grayson must of necessity be dismissed and the Court hereby so orders.

J. H. LAND

Clk.

W. F. McINTOSH,

Chief Justice, M. N.

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the

Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Muskogee Nation as same appears on pages 228 and 229 in the Minute Book of said Court, as on file in this office.

DEC 22 1913

C H D

J. G. WRIGHT,

Commissioner to the Five Civilized Tribes.

18

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No. 164.

In the
Supreme Court of the United States.
October Term, 1914.

PEGGY WOODWARD et al., - Plaintiffs in Error,

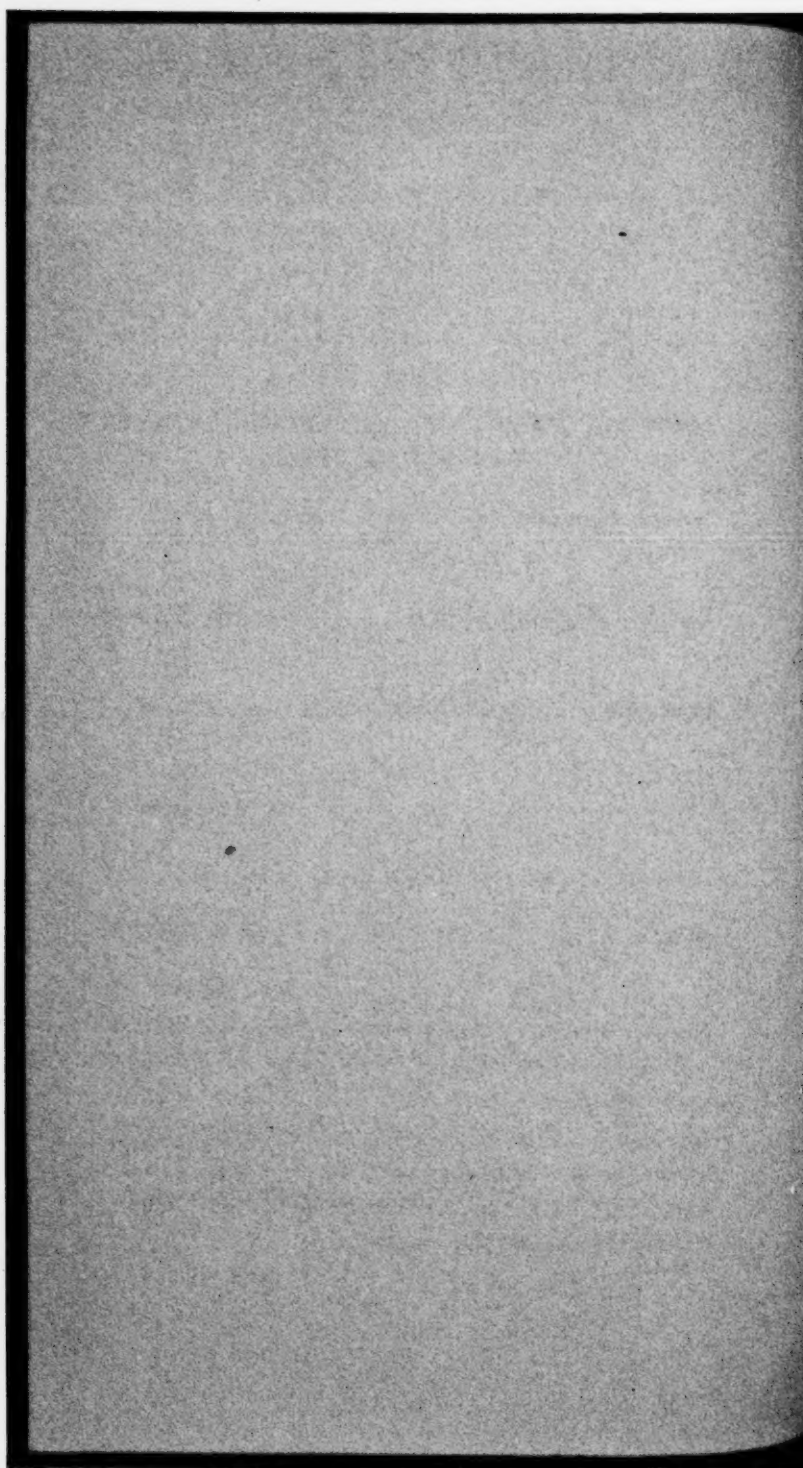
vs.

ROBERT P. deGRAFFENRIED, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
OKLAHOMA.

BRIEF FOR DEFENDANT IN ERROR.

**CHARLES A. COOK,
THOMAS H. OWEN,
JOSEPH C. STONE,**
Attorneys for Defendant in Error.



In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1914.

No. 164.

PEGGY WOODWARD et al., - Plaintiffs in Error,

vs.

ROBERT P. deGRAFFENRIED, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
OKLAHOMA.

BRIEF *for* DEFENDANT *in* ERROR.

The plaintiff in error presents two points. The first is a question of inheritance and has been determined against the plaintiff in error in recent cases by this court: *Shellenbarger v. Fewell* and *Reynolds v. Fewell*, decided January 18, 1915. The second is a contention that defendant in error is barred by an alleged former adjudication. This is the only point left for discussion.

The contention that the defendant in error is barred by a former adjudication does not present a federal question, but one of local practice.

The Supreme Court of Oklahoma, construing the laws of Arkansas extended in force in the Indian Territory (Territorial Statutes), disposed of the one point now left for consideration, as follows:

“The last proposition on which defendants rely is that the judgment in the partition suit is a bar to this action. It is urged that the title to the land was in issue in the partition suit and that when the court sustained a demurrer to the petition in that suit, and rendered judgment for the defendant, there was an adjudication of the title as prevents the plaintiff from maintaining this action.

“It will be observed that the partition suit was brought in equity. In so bringing the action plaintiff followed a practice almost, if not quite, universal. No case has been found where a partition suit was ever brought on the law side of the docket in the State of Arkansas. The practice in the Indian Territory was to bring such suits on the equity side of the docket.

“In the case of *Byers v. Danley*, 27 Ark. 77, decided in 1871, the Supreme Court of the State of Arkansas decided that equity would not take jurisdiction of a partition suit where the land was held adversely to the plaintiff in the partition suit. In *London v. Overby*, 40 Ark. 155, decided in 1882, the same rule was laid down. In *Moore v. Gordon*, 44 Ark. 334, the rule is followed. In the opinion of this case the court said:

‘The proceeding for partition cannot

be made a substitute for ejectment to recover an interest in land held partially by others.'

"In *Crisco v. Hambrick*, 47 Ark. 235, the rule was reiterated that partition could not be maintained against a person in adverse possession. The court said:

'So far as the record discloses, the lands are held adversely to him; he is excluded from any participation in the rents and profits; and his title is in dispute. He must therefore resort to ejectment, to establish his title, as an action for partition is maintainable only by a party in possession, or whose title is admitted.'

"The doctrine of these cases was adhered to in *Head v. Philips*, 71 Ark. 423; *Eagle v. Franklin*, 75 S. W. 1093.

"It was the rule in the *nisi prius* courts in the Indian Territory prior to statehood that a suit in equity for partition could not be maintained against persons in adverse possession. The title was not in issue and could not be in issue in the suit for partition brought by the plaintiff, and the trial court did not err in overruling the plea of *res adjudicata*."

Prior to statehood there was no legislative body except the Congress with power to enact laws for the Indian Territory. Congress extended over the Indian Territory the great body of the Arkansas statutes as contained in Mansfield's Digest. The Statutes of Arkansas came to the Indian Territory with the same force that they had in Arkansas. The procedure and practice was the same in the Indian

Territory as in Arkansas. An appeal to the Supreme Court seeking to present for review a question as to the effect of a dismissal where there was involved merely territorial laws not specially enacted for the Indians, no more presents a federal question than a similar appeal from the State of Arkansas. If the mere adoption of the Arkansas statutes for administrative purposes in the Indian Territory renders the statutes so adopted federal laws, whose construction presents a federal question, then the replevin statute brought over from Arkansas would present a federal question. This is merely a question of local pleading and practice. *John v. Paulin*, 231 U. S. 583; *Washington v. Miller* (Dec. 14, 1914). But if we are in error and it should appear to the court that the point ought to be examined, we present the following:

The defendant in error is not barred by former adjudication.

The Second Point raises the question, whether or not the special defense of plaintiff in error to the action of a former adjudication constitutes a bar thereto. This issue is raised by a demurrer (page 54 of the record) of Lewis Woodward and Peggy Woodward, defendants below to the amended complaint in equity of Robert P. deGraffenried, plaintiff below, filed in the United States Court for the Western District of the Indian Territory, at Muskogee, which is fully set out in the record, pages 46-47.

That was an action in equity by the plaintiff de-Graffenried, against the defendants Woodward for the *partition* of the land therein described, which is the land in controversy in this action. Said amended complaint, to which the demurrer was filed and sustained by the court, is in words and figures as follows:

“Comes now the plaintiff Robert P. de-Graffenried, leave of the court being first had, and amends his original complaint filed herein on the 2nd day of July, 1904, and in lieu thereof submits the following as a substitute.

“Plaintiff complaining of the defendants represents that they are all residents of the Western District of the Indian Territory, and for cause of action he states that theretofore to-wit: on the 29th day of June, 1900, one Agnes Hawes departed this life in the Creek Nation, Indian Territory, and at the time of her death she was a citizen of the Creek Nation, enrolled and recognized as such, and that she was not of Indian blood, being a negro of the full blood, and enrolled on the freedman roll of the Creek Nation. That the said Agnes Hawes before her death made selection of her allotment of land in the Creek Nation before the Commission to the Five Civilized Tribes of Muskogee, Indian Territory, and received a certificate therefor from the said Commission, which land is described as follows, to-wit: Southeast quarter of section 33, township 15 north, range 18th east, in the Creek Nation of the Indian Territory. That after her death and after the adoption of the treaty or agreement between the United States and the Creek Tribe of Indians, on the

25th day of May, 1901, the said Commission awarded said land to the heirs of Agnes Hawes, and thereafter on the 1st day of April, 1904, a patent to said land was duly issued to the heirs of said Agnes Hawes (without naming said heirs) by the Creek Tribe of Indians, by and through P. Porter, its Principal Chief; which patent was duly approved by the Honorable Secretary of the Interior, a copy of said patent being hereto attached, marked Exhibit A and made a part hereof, that said patent was duly recorded by the said Commission to the Five Civilized Tribes and delivered to the defendants as two of the heirs of the said Agnes Hawes; that the said Agnes Hawes died intestate, and at the time of her death she was the lawful and acknowledged wife of Rastus Hawes; that the said Agnes Hawes died without issue and left surviving her as her only heirs at law Rastus Hawes, her husband, Louis Woodward, defendant, as her father, and defendant Peggie Woodward, her mother, and that these three named parties were the only heirs at law she left surviving her.

“Plaintiff further avers that by the terms and provisions of the above described treaty or agreement between the United States and the Creek Tribe of Indians, dated May 25, 1901, the lands of deceased citizens of said Creek Nation should descend and be distributed under and according to the laws of descent and distribution of said Creek Tribe of Indians, which law is here specially pleaded and is as follows, to-wit:

‘The lawful and acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no children and the child’s part if there should be chil-

dren, in all cases where there is no will. The husband surviving shall inherit of deceased wife in like manner.'

"Plaintiff says that the above statute, as found in *McCellop's complication* of the laws of the Creek Nation, is the only law of inheritance of said Creek Tribe of Indians, and that under the said law the said Rastus Hawes, husband of said Agnes Hawes, is one of the heirs at law of the said Agnes Hawes and as such heir is the owner of and entitled to one-half of the above described land allotted as aforesaid to the heirs of the said Agnes Hawes, deceased. That as such heir the said Ratus Hawes did on the 22nd day of June, 1904, execute and deliver to this plaintiff his certain warranty deed, which deed was duly and regularly acknowledged and duly recorded in the office of the Clerk of the United States Court for the Western District of the Indian Territory, at Muskogee, whereby he conveyed to plaintiff in fee simple an undivided one-half interest in and to the above described quarter section of land, copy of said deed being hereto attached, marked Exhibit B, and made a part of this complaint. Whereby plaintiff says that he is the owner in fee simple of an undivided one-half of said land.

"Plaintiff further states that his interest in said land, which is an undivided one-half as aforesaid, is well and reasonably worth the sum of \$8,000.00.

"Plaintiff further represents that said quarter section of land is of such a character, being agricultural land, that the same can be justly and equitably divided between the plaintiff and the defendants, and that the plaintiff

is desirous of having the same divided in partition.

“Plaintiff further avers that the defendants disregard and wholly deny the rights of plaintiff in and to said land and have refused and still refuse to divide or partition said land, and that they are now in the actual possession of same enjoying the fruits and revenue therefrom and refuse to recognize the rights of plaintiff to any portion of said land or to the rents and revenues from same.

“The premises considered plaintiff prays for process to compel the defendants to answer hereto and on the final hearing he prays for judgment to partition said land between defendants and the plaintiff as their rights and interests may appear to the court; and that your honor make an order appointing a commission, residents of the Western District of the Indian Territory, to partition the above described land according to the rights of plaintiff and the defendants as may be determined by this court, and for all costs of suit.”

To which amended complaint the said defendants interposed their demurrer in the following words and figures, to-wit:

“Comes now the defendants, Louis and Peggie Woodward, and demurs to the complaint (amended) of the plaintiff herein, and for cause says:

(1) That plaintiff's complaint does not state facts sufficient to constitute a cause of action.

(2) That complaint of plaintiff is not sufficient in law to constitute a cause of action.

Wherefore defendants pray that complaint of plaintiff be dismissed, and for all other just, equitable and proper relief."

Upon the issue of law so joined the court rendered judgment in the following words and figures, to-wit:

"And on this day comes on to be heard the defendants' demurrer, filed July 11th, 1906, to the amended complaint herein. And the court having heard the argument of counsel and being well and sufficiently advised in the premises doth sustain said demurrer. Whereupon the plaintiff declines to plead further in this case and stands by his amended complaint and excepts to the ruling of the court in sustaining said demurrer to said amended complaint. And it is ordered that said amended complaint be and the same is hereby dismissed for want of equity, to which ruling the plaintiff excepts and prays an appeal, which is granted. And it is agreed by the parties that a supersedeas bond be and the same is hereby fixed at \$300.00."

This being an action for *partition* of real estate we insist that the judgment of the court upon the demurrer was *correct*, but did not settle the *merits* of the controversy and did not bar an action by the plaintiff to *recover possession* of said land by *action of ejectment*. By reference to said amended complaint it appears therein as follows: "Plaintiff further avers that the *defendants disregard and wholly deny the rights of the plaintiff in and to said land and have refused and still refuse to divide or parti-*

tion said land, and that they are now in the actual possession of same enjoying the fruits and revenue therefrom and refuse to recognize the rights of plaintiff to any portion of said land or to the rents and revenue from same." Thus it appears upon the face of the pleading, stating the cause of action upon which plaintiff relied for the purpose of having partition made between himself and the defendants, that he *admitted and alleged* that he *was not in possession himself* but that the *defendants* were in the *actual possession* adverse to him and *wholly denied* his rights to said land or to any interest or profits enuring therefrom. Defendants, by their demurrer, insisted that the plaintiff did not state facts sufficient to constitute a cause of action and was insufficient in law. These facts appearing to the court the judge promptly sustained the demurrer and dismissed his action.

Now the question arises, in as much as plaintiff could not upon those facts sustain his action for *partition* of the land, is he barred by the judgment rendered therein from bringing *an action in ejectment* (as he has done in the case at bar) to *establish his title and recover possession*? If the merits were decided in the partition proceeding by the judgment of the court below then this action is barred. If not, then the action is not barred. Why was plaintiff's said action dismissed? Because it was an action *for partition of land* of which he was not in possession; but that possession thereof was held ad-

versely and his right thereto denied. The authorities are all agreed, that in a case like this, an action to recover the possession of the land in ejectment afterwards brought is not barred by the judgment upon a demurrer in the action for partition.

Gould's Pleading (Edition 1861), page 445, section 45:

"But if the plaintiff, on demurrer fails in his first action, from the omission of an essential allegation in his declaration, which allegation is supplied in the second; the judgment in the first is no bar to the second; although both actions were brought to enforce the same right. For in this case, the merits of the cause, as disclosed in the second declaration, were not decided in the first.

Section 45, upon the same principle if the declaration is adjudged ill on demurrer, because the action is misconceived (as if debt or assumpsit is brought where account is the only remedy; or if trespass is brought, where the only proper action is trover or detinue); the judgment is no bar to a proper action, afterwards brought for the same cause. For in this case, as in the last, the merits of the cause could not be determined in the first."

This doctrine is maintained in the case of *City to the use of McCreary v. Roth*, 47th Arkansas Report 222 (on page 226); *Gould v. Railroad Company*, 91st U. S. 526 (23 L. C. Edition 416); Rose's Notes on U. S. Reports, Vol. 8, 719.

Vol. 2, Black on Judgments, 2nd edition, section 715 (page 1074). It is also an undisputed rule

of law that where "a judgment is given against the plaintiff upon the ground that he has mistaken his remedy or cause of action it is no bar to a subsequent suit brought in a proper form."

Section 715, page 1075, Black on Judgments:

"Where one holding an estate in lands brings an action for partition against those claiming adversely such person is not thereby precluded by the dismissal of his bill, from bringing ejectment against the same persons for the same estate. So again, where a party mistaking his remedy, attempts to enforce a claim by presenting it as a set off, but against a wrong party and in a suit where it is not and cannot be available, this does not debar him from afterwards suing the right person on such claim." (On page 1075.)

Section 716, page 1075:

"In general, a judgment dismissing a suit on account of any technical defect, irregularity, or informality, is not on the merits and therefore no bar to a subsequent suit."

In the case of *London v. Overby*, 40th Ark. Reports, page 155, the court, in construing section 4789 of Mansfield's Digest, holds that partition cannot be had of lands held adversely, or the title to which is in dispute, unless the lands be vacant and not in actual possession. Where the co-tenant has been ousted, or his rights totally denied by his co-tenant, his legal remedy is by ejectment, in which he may recover his just proportion of the land, and

also of the rents and profits, citing with approval the case of *Byers v. Danley*, 27th Ark. 77, where the question was squarely presented (page 86): "Can partition be had, in chancery, when the property to be divided is held adversely, or when the title is in dispute?" The court there decided that it could not and "Dismissed the bill for want of equity." Note, that the land in controversy is "agricultural" (Amended complaint, page 46 of record) not vacant; in *actual* possession yielding revenue (same page).

In Bigelow on Estoppel, page 61, section 6, the author says:

"* * * That when it is doubtful (either from the record or from evidence designed to explain the same) upon which of several issues the judgment, decree or sentence proceeded, the subject is still at large for further litigation. There is no presumption available to make the record binding in such a case."

In the case of *Russell v. Place*, 94 U. S., page 606 (L. Co. ed. 214). Mr. Justice FIELD delivering the opinion of the court says

"it is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the

record—as, for example: if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. * * * To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried and determined; that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter. * * * According to Coke, an estoppel must ‘be certain to every intent;’ and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.”

Thus it clearly appears from the principles of law generally, and from the express decisions of the point by the Supreme Court of Arkansas that this action is not barred by the judgment pleaded as a defense. It is useless for us to remind the court of the fact that the decisions above cited of the Su-

preme Court of Arkansas construing and declaring the law of that state upon the statutes of partition involved became and were the law of the Indian Territory by adoption—of the statute and construction placed thereon by the Supreme Court of that state.

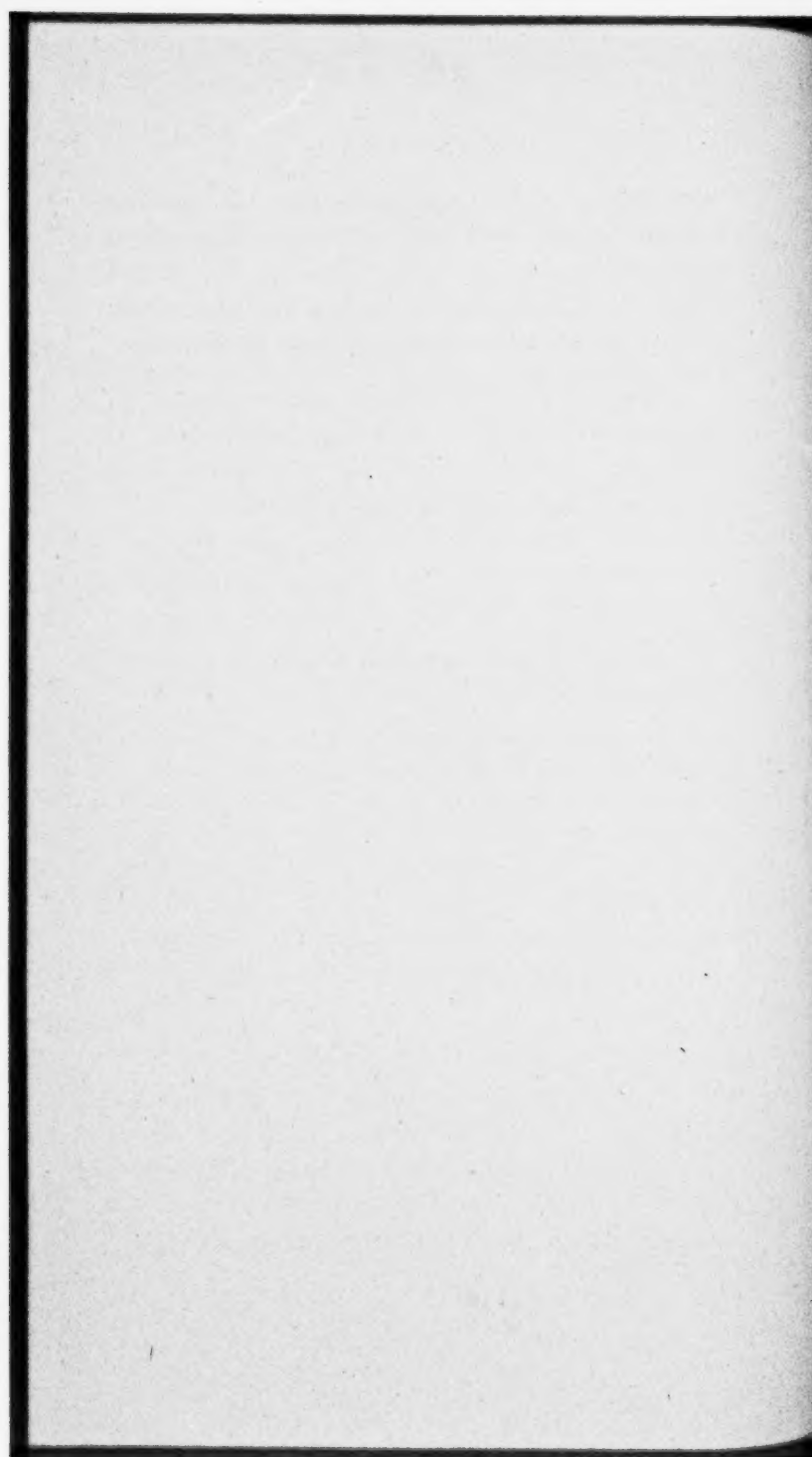
Wherefore, defendant in error respectfully prays that plaintiff in error may take nothing by her appeal, and that the decision and decree of the Supreme Court of Oklahoma be affirmed.

CHARLES A. COOK,

THOMAS H. OWEN,

JOSEPH C. STONE,

Attorneys for Defendant in Error.



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Office Supreme Court, U. S.

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JAMES D. MAHER

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No. 164.

In the
Supreme Court of the United States.
October Term, 1914.

**PEGGIE WOODWARD, RICHARD WOODWARD,
VIOLA WOODWARD, et al., Plaintiffs in Error,**

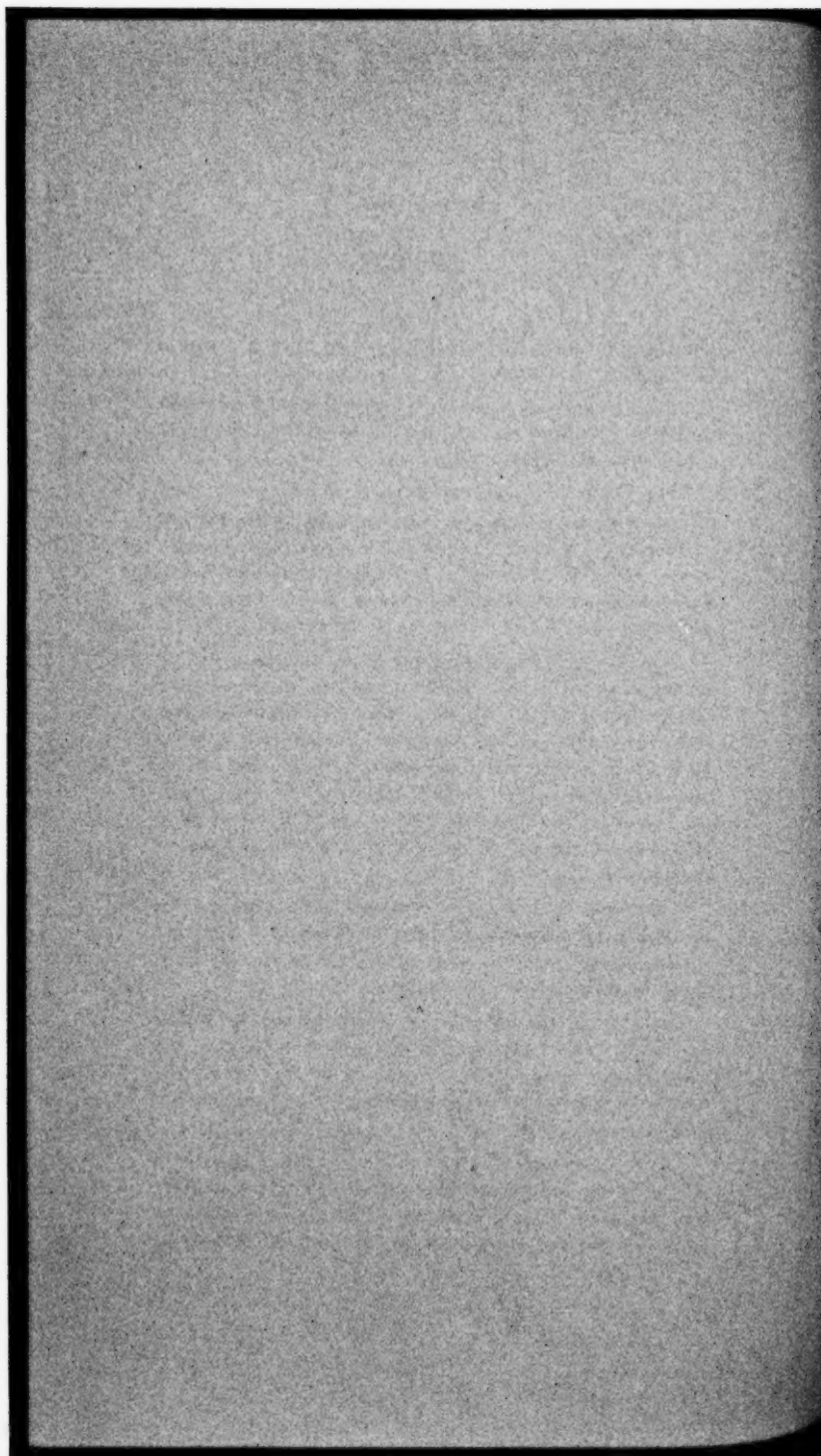
vs.

ROBERT P. de GRAFFENRIED, Defendant in Error.

**IN ERROR TO THE SUPREME COURT OF THE STATE OF
OKLAHOMA.**

***Brief for Defendant in Error in Answer to Sub-
stituted Brief for Plaintiff in Error.***

**THOMAS H. OWEN,
JOSEPH C. STONE,
*Counsel for Defendant in Error.***



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In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1914.

No. 164.

PEGGIE WOODWARD, RICHARD WOODWARD,
VIOLA WOODWARD, et al., *Plaintiffs in Error,*

vs.

ROBERT P. de GRAFFENRIED, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF
OKLAHOMA.

BRIEF FOR DEFENDANT IN ERROR IN AN-
SWER TO SUBSTITUTED BRIEF FOR
PLAINTIFF IN ERROR.

Statement.

We submit this brief under the following prop-
ositions or heads (for pages see foregoing index):

I.

The assignments of error do not present the
principal questions discussed in the substituted
brief; therefore they should not be considered.

II.

The land involved, which was selected by Agnes Hawes, a Creek citizen who died June 29, 1900, was not allotted under section 11 of the Curtis Act. The preliminary or tentative allotment was under the proposed Creek Agreements which failed to become laws. Final allotment was under the Original Creek Agreement.

III.

The Original Creek Agreement at sections 6 and 28 confirmed to the heirs of Agnes Hawes, as said heirs were determined by the Creek law and in the proportions provided for in that law, the temporary allotment selected by Agnes Hawes and made the same a final allotment in the hands of the heirs. At final allotment the right to patent vested for the first time. The case of *Washington v. Miller*, 235 U. S. 422, is decisive of this case in favor of the defendant in error.

IV.

Oklahoma cases holding that the Creek law governed in all cases where "Curtis Bill allottees" died after the selection of their allotments and prior to the Original Creek Agreement.—Rule of Property.

V.

The Creek law of descent was intended to govern the devolution of all Creek allotments, both surplus and homestead, whether allotted direct to citizens or for the benefit of their heirs after the death of the citizens entitled to receive allotment.

VI.

If the allotment involved was made under section 11 of the Curtis Bill the allottee took only the Indian title, "the exclusive use and occupancy," exclusive of the minerals and nothing more, and the interest of the allottee therein, the same being a mere possessory right, was subject to further legislation and agreement, and even though it should be held that this right passed to the heirs by descent it was not a vested right as against the government and the Creek Nation in the matter of final allotment and distribution of the lands.

VII.

The fact that Ratus Hawes murdered his wife does not operate as a forfeiture of his right to inherit her property.

VIII.

Res adjudicata.

BRIEF and ARGUMENT.

I.

The assignments of error do not present the principal questions discussed in the substituted brief; therefore they should not be considered.

The plaintiff in error filed an additional brief after the answer brief for defendant in error and just now we are served with a copy of a second additional or substitute brief for the plaintiff in error. Both seek to present two propositions not assigned as error. These new contentions are (1) that the descent involved in this case was cast under the Arkansas law and not under the Creek law, as heretofore contended by plaintiff in error; (2) that defendant's grantor was barred from inheritance by his murder of his wife, the allottee. We contend that neither of these new points should be considered by the court. The assignments of error present two questions, (1) Could a non-citizen of the Creek Nation inherit under the Creek law; (2) Is the defendant in error barred by a former adjudication. The first question raised by the assignments was disposed of adverse to the contentions of plaintiff in error, in the cases of *Shellenbarger v. Fewell* and *Reynolds v. Fewell*, decided Jan. 18, 1915. The second point presented by the assignments is merely

one of local law and practice and is not subject to review by this court. See citations in our first brief for defendant in error. Plaintiff in error now seeks to change entirely the theory upon which he appealed the case and upon which the briefs both for the plaintiff in error and the defendant in error were first prepared and filed. He cannot successfully accomplish this.

The assignments of error are as follows:

“(1) In holding and adjudging that under the evidence, agreed statement of facts, pleadings and laws of the United States relating to the allotment and disposition of the lands of the Muscogee, or Creek Tribe of Indians, and the descent and disposition of such lands after the death of an allottee of such lands, intestate, and without children or descendants of children surviving, and whose nearest relation of Creek citizenship being her mother, the said plaintiff, Peggie Woodward, and whose husband surviving, was a non-citizen of said Creek Nation; that said defendant in error had established title in fee simple to an undivided half of 160 acres of land, the subject matter of this action, under a deed of conveyance from the surviving husband of said allottee, who is a non-citizen of said tribe of Indians, and the right thereunder to a joint possession as tenant in common with said Peggie Woodward of said land contrary to an Act of Congress approved March 1, 1901, entitled ‘an act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians, and for other purposes,’ whereby said plaintiff in error, Peggy Woodward, was de-

prived of the title and right of possession, to an undivided one-half of said land, as she should have had and did have under said laws of the United States.

(2) The Supreme Court of Oklahoma erred in holding that the said plaintiff in error Peggie Woodward, as a citizen of said Creek Nation of Indians, and nearest of kin of Creek blood, and citizenship to said allottee, as shown by the agreed statement of facts in said case, and the Creek law of descent, adopted by said last named Act of Congress, namely, the Act of March 1, 1901, entitled 'an act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and for other purposes,' whereby said Peggy Woodward was deprived of her title and right of possession to an undivided one-half of said tract of land, as heir at law of the said allottee, under said Creek law of descent and distribution as adopted by said act of Congress, which judgment and holding was contrary to the laws of the United States, aforesaid.

(3) The Supreme Court of the State of Oklahoma erred in holding and adjudging in this cause, under the agreed statement of facts, evidence and laws of the United States and especially under said act of Congress, approved March 1, 1901, entitled 'an act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians and for other purposes,' notwithstanding the conceded facts that the land in controversy in this action was formerly a part of the public domain of the Creek Nation of Indians, and by the enrollment of Agnes Hawes, formerly Agnes Woodward, as a

citizen of said nation, she became and was entitled to have and receive an allotment of 160 acres of land out of said public domain, as she might select or have selected, as provided by an act of Congress adopted June 28, 1898, and that thereunder she did select as and for her allotment the said 160 acres of land, the sole subject matter of this action, prior to her death, which was on the 29th day of June, 1900, and that afterward a patent therefor was issued to the heirs of said allottee, without other description, April 1, 1904; that said allottee died intestate, without child or children, or descendants thereof, leaving a husband, Ratus Hawes, and her mother, said Peggie Woodward, plaintiff in error, an enrolled citizen of said Creek Nation of Indians, and her nearest relation of Creek citizenship, and her father, Lewis Woodward, a non-citizen of said nation of Indians, now deceased, and the other co-plaintiffs in error as her nearest of kin; and notwithstanding the law of descent of the Creek Nation, as shown by the record in this case, and as interpreted and construed by the Act of Congress of June 30, 1902, entitled 'an act to ratify and confirm a supplemental agreement of the Creek Tribe of Indians and for other purposes,' providing for the descent of the lands of the Creek Nation and the tribal funds thereof should descend in the line of the Creek blood and Creek citizenship, the said Supreme Court of the State of Oklahoma adjudging that one-half of said allotment of said Agnes Hawes descended to said Ratus Hawes, non-citizen husband of said deceased allottee, and the other half to her mother, Peggie Woodward, plaintiff in error, the said defendant in error, Robert P. de Graffenried, being the gran-

tee of said Ratus Hawes under a deed of warranty of June 22, 1904, wherefore, this plaintiff in error, Peggie Woodward, contrary to the facts and the law and especially the said Acts of Congress and laws of descent of said Creek Nation of Indians adopted by said Act of Congress of March 1, 1901 became and was deprived of an undivided one-half of said tract of 160 acres.

(4) The said Supreme Court of Oklahoma erred in holding and adjudging that so much of the answer of said plaintiff in error Peggie Woodward, as affirmatively alleged a defense to the said action of defendant in error was not a defense thereto, though alleged that the same had been forever barred by a former recovery in an action brought by said defendant in error (then plaintiff) against this plaintiff in error (then defendant) and her co-defendant and husband, Lewis Woodward, since deceased, and also a co-defendant in this action, which has been revived in favor of his heirs, the other co-plaintiffs in error herein, as appears from the records of this cause, although she says therein, June 2, 1904, this defendant in error brought his action in the United States Court for the Western District of Indian Territory, against said Peggie Woodward and her husband, Lewis, and after his death revived in favor of his heirs, as aforesaid, for the partition of the said land, and none other, between him and said defendants therein, alleging and claiming to be a tenant in common in fee and entitled to joint possession with them of an undivided one-half of the same, under and by virtue of a warranty deed of conveyance executed to him therefor by one Ratus Hawes, husband of the allottee, Agnes Hawes, a citizen of the Creek Tribe of Indians,

who died intestate, leaving no child, children or descendants thereof, and her father, said Lewis Woodward, and her mother, said Peggie Woodward; and that the wife of said grantor had selected and received her said allotment but died intestate June 29, 1900, before receiving her patent therefor, which was afterward, April 4, 1904, executed to her heirs, without other description; and further therein alleged as ground for title in said grantor, Ratus Hawes, that said Act of Congress of March 1, 1901, provided that the allotments of deceased citizens of said nation should descend according to the law of descent of the Creek Nation, and which was set forth in said complaint, as follows:

'The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of his estate if there are no children, and a child's part if there should be children, in all cases where there is no will. The husband surviving shall inherit in like manner.' It was further alleged in said complaint that the defendants do deny his title, refuse to partition, are now in actual possession receiving rents and profits, and deny him the same or any part thereof, and pray for judgment of partition. Demurrer sustained, plaintiff stood by his complaint and judgment of the court: 'Complaint be and is dismissed for want of equity,' September 3, 1906, and so remains the record of said United States court, and so proved to the trial court, and so appeared in its record in the Supreme Court of Oklahoma, that the same was not a bar or sufficient defense to this defendant's cause of action, and judgment was rendered accordingly in favor of defendant in error, declaring him the owner in fee as tenant in common with said plaintiff,

Peggy Woodward, and entitled to have, hold and enjoy with her the joint possession of said 160-acre tract of land.

(5) The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the trial court and remanding the cause to said court directing a judgment for these plaintiffs in error for costs by them expended and incurred therein."

Where a question has not been presented by proper assignment of error counsel will not be heard *except at the request of the court*, and errors not specified according to the rule of court *will be disregarded*, but the court may at its option, notice a *plain error* not assigned.

—*George Treat and J. M. Dickerson, plaintiffs in error v. Samuel Jemison*, 20 Wall. 652, 22 L. ed. 449;

Columbia Heights Realty Company v. Cuno H. Rudolph, et al., 217 U. S. 546, 54 L. ed. 877;

Behn, Meyer & Company v. Campbell & Co. 205 U. S. 405, 51 L. ed. 857;

Deering Harvester Company v. Kelly et al., 103 Fed. 261;

George et al. v. Wallace et al., 135 Fed 286.

In the *Treat* case, *supra*, Mr. Chief Justice WAITE, speaking for the court said:

" 'An assignment of the errors relied upon which, in cases brought up by writ of error, shall set out separately and specifically each error as-

served and intended to be urged;’ and section 8, ‘without such an assignment of errors counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, though the court at its option may notice a plain error not assigned.’

There is no such assignment of errors in this case as is required by the rule, and we do not see in the record any error that ought to be noticed without an assignment.”

In the *Behn case*, *supra*, Mr. Justice MOODY, delivering the opinion of the court, said:

“The case would stop here were it not for the fact that the defendants in their brief and in the oral argument in their behalf go beyond the assignment of errors and set up three alleged errors of law not contained in them. * * * In such cases alleged errors not stated in the assignment of errors filed with the petition for the writ have sometimes been considered. The limits of this practice are accurately stated in the thirty-fifth rule of this court. There it is said that if errors are not assigned ‘with the petition for the writ they will be disregarded, except that the court at its option may notice a plain error not thus assigned.’

But we find no such plain error in the opinion of the Supreme Court as warrants us in reversing its judgment.”

In the case of *Columbia Heights Realty Company v. Rudolph*, *supra*, Mr. Justice LUTON, in the court’s opinion said:

“The act of February 9, 1893, chap. 74, sec. 8, 27 Stat. at L. 436, U. S. Comp. Stat. 1901, p.

573, concerning writs of error and appeals from the court of appeals of the District of Columbia, provides that they shall be allowed in the 'same manner and under the same regulations as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia.' The procedure referred to is that found in sec. 705, Rev. Stat., which provides that such writs or appeals shall be allowed in the 'same manner' and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a circuit court.'

Secs. 997 and 1012, Rev. Stat. (U. S. Comp. Stat., 1901, pp. 712, 716), require the transcript from the Circuit Court to be filed with an assignment of error, and the 35th rule of this court prescribes the character of such assignments, and that 'no writ of error or appeal shall be allowed until such assignments of errors shall have been filed, * * *' and that 'errors not assigned according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned.' This rule refers in terms only to writs of error and appeals under sec. 5 of the Act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), but it is, in effect, extended to every writ of error or appeal to or from any court by rule 21, which requires that the brief shall set out 'a specification of the errors involved.' This 'specification of the error' must conform to rule 35 in particularity. Thus, the fourth paragraph provides: 'When there is no assignment of errors, as required by sec. 997 of the Revised Statutes, counsel will not be heard, except at

the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option may notice a plain error not assigned or specified.'

The court has, however, not regarded itself as under any absolute obligation to dismiss a writ of error or appeal because of the nonassignment of errors, as required by secs. 997 and 1012, Rev. Stat., having, by its rules, reserved the option to notice a plain error, whether assigned or not. *Independent School Dist. v. Hall*, 106 U. S. 428, 27 L. ed. 237, 1 Sup. Ct. Rep. 417; *Farrar v. Churchill*, 135 U. S. 609, 614, 34 L. ed. 246, 249, 10 Sup. Ct. Rep. 771; *United States v. Pena*, 175 U. S. 500, 502, 44 L. ed. 251, 252, 20 Sup. Ct. Rep. 165.

In the present case, the brief of counsel for the plaintiffs in error specifies ten alleged errors. The defendants in error have made no objections for failure to assign error under secs. 997 and 1012, Rev. Stat., but have submitted the case upon the specifications of error in the brief of the plaintiffs in error. For these reasons, we shall exercise the option reserved under both rules 21 and 35. of examining the transcript, that we may be advised as to whether there has occurred any 'plain error,' which obviously demands correction."

Under the foregoing decisions this court should not consider these new propositions unless there is "plain error." There is none. The points now sought to be presented are so doubtful that they never occurred to counsel until it was apparent that the case of the plaintiff in error was lost upon the theory already briefed in the Supreme Court. There

is a line of Oklahoma cases, beginning with *Barnett v. Way*, 29 Oklahoma 780, well considered, squarely holding that where a Creek citizen took an allotment prior to the Original Creek Agreement and died, just as in this case, before the Original Creek Agreement that the descent was cast under the Creek law set forth in the Original Creek Agreement. The opinion of the lower court in the case at bar is strong on this point, 36 Okla. 81. Certainly there is no "plain error" at this point. The second proposition now sought to be presented, namely; that the husband could not inherit from the wife he had killed (he did not murder her to acquire her property) does not present "plain error." Since the descent of this case must be considered as passed under the Creek law, that law must be examined to determine whether the murder of a wife would prevent the husband from inheriting her property. The court cannot invoke the common law, as we shall show under another head in this brief, to determine this question because it is purely a matter of Creek statute. That law is in writing and is set forth in full in *Reynolds v. Fewell*, decided Jan. 18, 1915, and there is no provision barring the husband by reason of his murder.

Sec. 8 of the Creek law controls here. It provides:

"The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no other heirs and an

heir's part, if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner." Laws of Muscogee Nation, 1880, p. 60.

But even if the common law should be invoked to determine this question the authorities are in conflict upon the question, the weight of authority being with the contention that such a murder would not bar the husband from inheritance. There is no "plain error" at this point.

Counsel for plaintiff in error cite some criminal cases where the Supreme Court has of its own volition, without assignment, considered plain error, but criminal cases are on a different basis. Where life or liberty is at stake the court will go further without assignment of error to prevent a miscarriage of justice.

The principal point now sought to be presented by plaintiff in error is entirely *inconsistent* and at war with his principal assignments of error. The brief presented now is not only on a new theory of the case but is wholly *inconsistent* with his first brief which we have answered long ago. Since discovering he cannot take the land involved under the Creek law he is now saying he was mistaken about the Creek law and will take the land under the Arkansas law, if you please.

II.

The land involved, which was selected by Agnes Hawes, a Creek citizen who died June 29, 1900, was not allotted under Section 11 of the Curtis Act. The preliminary or tentative allotment was under the proposed Creek Agreements which failed to become laws. Final allotment was under the Original Creek Agreement.

The assignments of error present only one question as regards descent, namely: Did a non-citizen of the Creek Nation inherit under the Creek law? In the recent cases of *Shellenbarger v. Fewell* and *Reynolds v. Fewell*, this court having decided the point against the plaintiff in error, counsel now advance, for the first time, the theory that the Arkansas law controlled, which law, if applied to this case, would defeat the defendant in error. To sustain this new contention counsel call attention to the fact that the Creek citizen in whose name this land was allotted died June 29, 1900, after having received a preliminary or tentative allotment. They cite the recent case of *Welty v. Reed* by the Circuit Court of Appeals for the Eighth Circuit, where it is held that such an allotment as this was made under Section 11 of the Curtis Bill, Act of June 28, 1898, ch. 517, 30 Stat. L. 495. Under another head in this brief we shall examine the case of *Welty v. Reed* particularly. Under this caption we will notice the one aspect of that case where it is recited that the allotment was

made under Section 11 of the Curtis Act. An examination of the history of the tentative allotments made to Creek citizens prior to the Original Creek treaty or Act of March 1, 1901, 31 Stat. L. 861, must make it clear that no final allotments were made in the Creek Nation prior to the Original Creek Agreement, and that no allotments were made in the Creek Nation under Section 11 of the Curtis Act. On April 1, 1899, the Commission to the Five Civilized Tribes, at Muskogee commenced to receive applications for allotment in the Creek Nation. Almost ten thousand applications were made before the Original Creek Agreement. Upon these applications *preliminary* allotments were made under the rejected Creek Agreement proposed in the Curtis Bill, and under the proposed Creek Agreement of February 1, 1899. We shall show that no attempt was ever made by the Commission to the Five Civilized Tribes to allot under Section 11 of the Curtis Act; that on the other hand, Creek citizens were first permitted to select their allotments upon the theory that a treaty would be negotiated substantially in the terms of the rejected Creek Agreement proposed in the Curtis Bill. After the treaty proposed in the Curtis Act failed of ratification, the government of the United States and the Creek Nation, by their representatives, negotiated another treaty, that of February 1, 1899, which was substantially in the same terms as the rejected Creek Agreement. Later, we will refer more particularly to these two proposed agreements, and

will demonstrate that all allotments made in the Creek Nation prior to the Original Creek Agreement were merely preliminary or tentative allotments and were so styled by the Commission to the Five Civilized Tribes. We now come directly to the point that this allotment was not made under Section 11 of the Curtis Bill. That section, so far as material to this discussion, is as follows:

“That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under acts of Congress and known as the ‘Dawes Commission’ shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same; but all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits; and all town sites shall also be reserved to the several tribes, and shall be set apart by the Commission heretofore mentioned as incapable of allotment. There shall also be reserved from allotment a sufficient amount of lands now occupied by churches, schools, parsonages, charitable institutions, and other public buildings for their present actual and necessary use, and no more, not to exceed five acres for each school and one acre for each church and each parson-

age, and for such new schools as may be needed; also sufficient land for burial grounds where necessary. When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval."

The allotment here involved was not selected, set aside or made in accordance with the provisions of section 11 for the following reasons: (1) The rolls of citizenship of the Creek Nation had not been completed, as provided in section 11, which must have been done prior to the allotment under that act; (2) There was no appraisement or classification of the lands in the Creek Nation prior to the Original Creek Agreement, and there was, therefore, no basis from which the Commission might have given to each citizen, as provided in section 11, his fair and equal share of all the land value of the tribe; (3) Under the terms of section 11 selections of allotments were ineffectual until approved by the Secretary of the Interior. No selections were approved by the Secretary prior to the Original Creek Agreement; (4) The selections made by citizens of the Creek Nation prior to the Original Creek Agreement were preliminary only and were so styled and named by the Commission to the Five Civilized Tribes and by the Secretary of the Interior in annual reports, that is to say, there was no effort by the Commission to make any *final allotments* at that time. (5) Tribal consent to final

allotment had not been procured prior to the Original Creek Agreement, and the nature and extent of the Creek tribal title was such that Congress could not dispose of the tribal lands without the consent of the tribe; But if the defendant in error were mistaken in his contention that congress could not dispose of the lands of the tribe without the consent of the tribe, still the same conclusion must be reached, because it is manifest, as the courts have held, that it was the intention of Congress to dispose of the tribal property only with the consent of the tribe. If the court should hold that allotments of this character in the Creek Nation were made under Section 11 of the Curtis Bill, it could only be upon the ground that Congress was attempting to prepare the way for tribal agreement to the partition and allotment of the land, there being no provision in the Curtis Bill for the acquisition of individual titles. (6) All the lands in the Creek Nation except the remnant of the public domain offered for public sale have been allotted under the Original Creek Agreement, which fixes the right to allot as of April 1, 1899, and to hold that the so-called Curtis Bill allottees had their final allotments, would be to overturn the entire scheme of allotment in the Creek Nation and to produce disorder and confusion beyond the almost insurmountable confusion which already exists.

None of the conditions of Section 11 of the Curtis Bill were ever complied with in the Creek Nation. We will now examine those conditions, first directing

attention to the rolls of citizenship of the Creek tribe. Section 11 provides, in part:

“That when the roll of citizenship of any one of said nations or tribes is fully completed, as provided by law * * * the Dawes Commission shall proceed to allot the exclusive use and occupancy of the surface.”

Just here let us note the law as regards the rolls when the Curtis Bill became a law. The Act of June 7, 1897, 30 Stat. L. 83, provides as follows:

“That the words ‘rolls of citizenship,’ as used in the Act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the Act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this Act. And any name appearing on such rolls and not confirmed by the Act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have

ten days' previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation."

The Curtis Bill at Section 21 provides:

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the court of Claims rendered the third day of February, eighteen hundred and ninety-six.

Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes."

"The roll of Creek freedmen made by J. W. Dunn, under the authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation."

"Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to

take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States Court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

Under the foregoing provisions of the law the Dawes Commission proceeded *to list for enrollment* those deemed entitled to final enrollment, but these lists were not the rolls. In the Sixth Annual Report of the Commission to the Five Civilized Tribes to the Secretary of the Interior for the fiscal year ended June 30, 1899, at page 13, the Commission reports, after describing the progress in other tribes:

"Many more difficulties presented themselves to the Commission in the enrollment of Creeks, and their enrollment was not completed at the appointments made. Their enrollment, however, is gradually being affected, as will appear under another head."

In the Eighth Annual Report of the Commission for the fiscal year ended June 30, 1901, at page 28, it is said:

"During the latter part of the summer and in the autumn of the calendar year 1900 no aggressive action was taken by the Commission looking to the completion of the Creek rolls owing to the pressure of other duties and owing to the modified legislation relative to the enrollment of Creek citizens which was likely to result from the ratification of the agreement entered into with the Creek Nation March 8, 1900. * * * During the month of March, 1901, following the ratification by Congress of the Creek Agreement, the Commission established an office at Okmulgee, Ind. T., for the enrollment of citizens of said nation as a convenience to persons living in the western part of the nation whose enrollment was desired. Several hundred persons appeared before the Commission at that appointment and were *listed for enrollment* as citizens of the Creek Nation. As the Creek Agreement provided that no person whomsoever should be added to the rolls after the ratification of said agreement, the Commission deemed it advisable to make another appointment at Okmulgee during the month of May. * * * *In view of the probable ratification of the agreement then pending containing the*

provisions above referred to, the officials of the nation rendered all assistance possible, and as a result of the means employed and the extra effort put forth all the persons with but one or two exceptions whose names were on the last authenticated rolls of the Creek Nation, were *listed for enrollment* on the 25th day of May, 1901, the day on which the agreement was ratified by the Creeks." (Italics ours.)

The foregoing excerpts from the reports of the Commission to the Five Civilized Tribes show that prior to the Original Creek Agreement no permanent rolls were made but that applicants were merely *listed for enrollment subject to further investigation and final decision*. If it was intended (we deny that it was ever intended) that Creeks should be allotted under Section 11, it was only when the rolls of citizenship of the tribe should be fully completed as provided by law that the Commission might commence to allot lands. The plaintiff in error is in the attitude of contending that these tentative lists for enrollment were in fact the enrollment records, and further contending in the face of the plain letter of the statute that the Commission was authorized to make allotments in the Creek Nation without complying with the first necessary step, that is to say, the making of a roll. How important the making of this roll was prior to the taking of an allotment under Section 11 is manifest from the requirement in that section that the Commission should allot to each citizen "his fair and equal share considering

the nature and fertility of the soil, location and value of the same."

The second step necessary before an allotment could be made under Section 11 was the classification and appraisement of all the lands in the nation, for by no other means could each citizen get his fair and equal share of the land, the nature, fertility, location and value of the land considered. In the Seventh annual Report of the Commission to the Five Civilized Tribes for the fiscal year ended June 30, 1900, at page 10, the Commission makes it clear that they understood that appraisement and classification of the land was necessary before any allotment under section 11 of the Curtis Act. Here it is said:

"The character of the final allotment necessitates an amount of preliminary work unknown in any other allotment in which the government has hitherto engaged. It requires the allotment of all the land in the territory except such as is reserved for townsite and public purposes, to those who shall be determined by specific adjudication to be citizen Indians. The allotment is not to be of an equal number of acres to each allottee, but by equality of value as that value shall be determined by locality, fertility of soil, or any other element affecting values. The work must be so done that when completed each allotment will be as near as possible of equal value with every other. It follows that there is no certainty that any two of all the allotments will contain the same number of acres."

But ninety days before this declaration by the Commission to the effect that much preliminary work had to be done before the Commission could commence to allot under Section 11, they had actually commenced allotting to the Creeks in 160-acre tracts without regard to value or any of the conditions or terms of Section 11. What is the explanation of the Commission's utter failure to comply or even attempt to comply with the provisions of Section 11 in the matter of the allotment of Creek lands? The Commission make their own explanation, which is, in part, as follows: At page 11 of the Seventh Annual Report of the Commission for the year ended June 30, 1900, they say:

"On the third of January, 1900, three members of the commission, Messrs. Dawes, Bixby and McKennon, at the request of the Secretary, met at the Department in Washington, the chiefs of the Cherokee and Creek Nations for consultation. * * * These negotiations engaged the attention of these three commissioners at Washington till agreements were concluded with the Creeks on April 8 and with the Cherokees on April 9. These agreements were immediately reported to the Secretary and by him laid before Congress for its action. Final action has not been taken on them by Congress. There is every indication that they are highly satisfactory to the great body of the citizens of both tribes, and that they will be speedily ratified by them at an early day after final action by Congress. When this is done, final allotment will be made in all the tribes upon terms and by a tenure of title to which they have each assented."

In the Eighth Annual Report of the Commission for the year ended June 30, 1901, at page 32, the commissioners say:

“On December 1, 1900, the Commission began the classification of lands in the Creek Nation by placing five parties in that territory equipped the same as those in the Choctaw and Chickasaw Nations and operating under a similar schedule.”

In the Tenth Annual Report of the Commission to the Secretary of the Interior for the fiscal year ended June 30, 1903, the Commissioners say, at page 31:

“The survey and appraisement work of the Commission is finished. Actual field work was discontinued on January 31, 1902. It was expected to disband the seven survey parties which the Commission had in the field at the close of the calendar year 1902, but the work was retarded by excessive rains, necessitating the retention of five of these field parties during January of the present year.”

The commission in 1901 Annual Report, page 33 state: “With the exception of the Seminole Nation no lands have been appraised.”

From the foregoing it is certain that prior to the Original Creek Agreement there had been no classification or appraisement of the Creek lands, and therefore it was wholly impossible to make an allotment under the terms of Section 11, thereby giving to each citizen his fair and equal share of the public domain, the nature, fertility, location and

value of the land considered. How impossible it was to comply with Section 11 in the Creek Nation prior to classification and appraisalment of the lands, is manifest when it is considered that the lands were valued from \$6.50 per acre to 50 cents per acre. A table of classifications and values appears at page 32 of the Tenth Annual Report of the Commission to the Five Civilized Tribes for the year ended June 30, 1902. Natural open bottom lands were appraised at \$6.50; rough and rocky mountain land at 50 cents per acre. There were seventeen classifications in all, running all the way from \$6.50 to 50 cents. It was not within the realm of human possibility to commence to allot lands in accordance with Section 11 of the Curtis Bill prior to the completion of the rolls and the appraisalment and classification of the lands, but the statute on its face expressly shows that the allotment should not be undertaken in any nation until completion of the rolls and until after appraisalment. It is a well known historical fact that the Dawes Commission received about twice as many applicants for enrollment in the Creek Nation as there are enrolled members of the tribe. Only when the rolls were completed, fixing the number of the allottees and the lands valued, could any progress be made under Section 11, if, indeed, that section ever had any application to the Creek Nation, which we deny. This very act submits to the Creeks for their ratification an agreement which provides for an allotment of 160 acres of land to each Creek citizen, regardless of value, and further provides for the

equalizing of these allotments. The plaintiff in error is forced to assert that Congress provided, at Section 11, for the allotment of all Creek lands, and subsequently in that act provided that the Creeks might, at their option, adopt an entirely different system of allotment.

This view would convict Congress of absurdity. This act as well as all other acts of Congress looking to the partition and allotment of the lands in the Indian Territory, shows that it was never the intention of Congress to arbitrarily allot the lands, but only upon such terms as might be agreed upon in treaties. In its report to the Secretary of the Interior the Commission expressly refers to selections made prior to the Original Creek Agreement as "filings of selections preliminary to allotment in the Creek Nation." In the Seventh Annual Report of the Commission for the year ended June 30, 1900, at page 29, the Commission uses the following significant language:

"The filing of selections preliminary to allotment in the Creek Nation has continued without interruption since the report of the commission for the fiscal year ending June 30, 1899, which report contained a full description of this work in detail.

The fact, however, of no agreement having been concluded between the United States and the Creeks has produced very many possibilities contingent on prospective changes of which cognizance had to be taken by the commission, but which, owing to their uncertainty, could not be treated as items of final record. These provis-

ions, which related both to land reservations and to citizenship, have been the cause of much unsatisfactory and apparently, from the radical changes in the several agreements, useless provisional work." (Italics ours.)

In connection with the foregoing, consider the recital at page 11, 1900 report, *supra*, which after referring to the proposed agreements between the Cherokees and Creeks, states:

"There is every indication that they are highly satisfactory to the great body of citizens of both tribes, and that they will be speedily ratified by them at an early day after final action by Congress. When this is done, final allotment will be made in all the tribes upon the terms and by a tenure of title to which they have each assented."

In the Eighth Annual Report of the Commission for the fiscal year ended June 30, 1901, page 30, the Commissioners say:

"Since the opening of the Creek allotment office in April, 1899, 10617 persons have appeared before the Commission and made applications to select allotments. Of this number 9507 have received a *preliminary* allotment of 160 acres and 1060 have made partial selections."

The Original Creek Agreement, 31 Stat. L. 861, approved March 1, 1901, ratified by the Creeks May 25, 1901, contained the first provisions for the allotment of the lands of the Creek Nation *approved by*

the Creeks themselves. The principal provisions with reference to the taking of allotments are as follows:

2. "All lands belonging to the Creek Tribe of Indians in the Indian Territory, except town sites and lands herein reserved for Creek schools and public buildings, shall be appraised at their true value, excluding only improvements on lands in actual cultivation. The appraisement shall be made under direction of the Dawes Commission by such number of committees, with necessary assistance, as may be deemed necessary to expedite the work, one member of each committee to be appointed by the principal chief; and if the members of any committee fail to agree as to the value of any tract of land, the value thereof shall be fixed by said Commission. Each committee shall make report of its work to said Commission, which shall from time to time prepare reports of same, in duplicate, and transmit them to the Secretary of the Interior for his approval, and when approved one copy thereof shall be returned to the office of said Commission for its use in making allotments as herein provided."

3. "All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give to each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per

acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

If any citizen select lands, the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid."

9. "When allotment of one hundred and sixty acres has been made to each citizen, the residue of lands, not herein reserved or otherwise disposed of, and all the funds arising under this agreement shall be used for the purpose of equalizing allotments, and if the same be insufficient therefor the deficiency shall be supplied

out of any other funds of the tribe, so that the allotments of all citizens may be made equal in value, as nearly as may be, in manner herein provided."

The foregoing considered, the following propositions must be accepted as correct: (1) Under section 11 of the Curtis Bill no allotment could be made in the Creek Nation prior to the completion of the rolls. The rolls were not completed until the Original Creek Agreement, but were made under the terms of that act, therefore no allotment could have been made under section 11. (2) No allotment could have been made in the Creek Nation under provisions of section 11 prior to the classification and appraisement of the lands of the tribe, so that each member thereof might receive his fair portion thereof, value considered. The appraisement was not completed until after the Original Creek Agreement, and for this reason the Commission could not have allotted to Creek citizens under the provisions of the Curtis Bill. (3) Congress intended to partition and allot the lands with the consent of the tribe, and not otherwise. This consent was first procured in the Original Creek Agreement. (4) The allotments taken under the Curtis Bill were not final. The selections were preliminary only and were so recognized by the Commission and the Secretary.

If anything further were necessary to establish the foregoing propositions the very form of the allotment certificate issued under the Curtis Bill

would determine the point. The form of certificate issued to the applicants appears at page 76 of the Sixth Annual Report of the Commission to the Five Civilized Tribes for the year ended June 30, 1899, and is in the following form:

“Certificate of Selection, Creek Nation, Commission to the Five Civilized Tribes, Muskogee Land Office.

April 21, 1899.

This certifies that Leander M. Smith has this day filed his selection of the following described land, viz.:

Lots 3, 4, 5, 6, 7 and 8, of section 23, town. 17 N., range 17 E. containing 120.70 acres, more or less, as the case may be, according to the United States survey thereof.

TAMS BIXBY, *Acting Chairman.*”

Returning for a moment to the rejected Creek agreement proposed in the Curtis Bill, let it be remembered that the rejected agreement provided for the identical sort of allotment which the Commission attempted, that is to say, 160 acres of land regardless of value. As soon as the Creeks rejected that agreement the government commenced negotiating with the tribe with the view of procuring another. Under date of February 1, 1899, the United States negotiated an agreement with the Creek or Muskogee Nation by and through the Commission to the Five Civilized Tribes acting for the government and certain representatives of the Creek Nation whereby a treaty was proposed, which appears in the Sixth Annual Report of the Commission to

the Five Civilized Tribes for the year ended June 30, 1899, beginning at page 59. At section 4 it is provided:

“That the Commission to the Five Civilized Tribes shall allot 160 acres of land as nearly as may be, the boundaries to conform to the lines of the government’s surveys, to each and every citizen of the Creek or Muskogee tribe.”

Section 5 provided:

“160 acres of land of the minimum value as herein fixed shall constitute a standard allotment, and shall be the measure for the equalizing of values.”

At section 6 it was provided:

“The residue of the lands, after allotment of 160 acres to each citizen, as aforesaid, shall be used for the purpose of equalizing allotments.”

By reference to the foregoing reports of the Commission to the Five Civilized Tribes it is manifest that they commenced to receive selections, 160 acres for each applicant, upon the theory that the rejected Creek agreement contained in the Curtis Bill furnished substantially the plan which would be agreed upon finally by the tribe and the government for allotment, and that 160 acres of land, regardless of value, would be the standard allotment. When the proposed treaty of February 1, 1899, which was agreed upon 60 days before the land office opened to receive application for allotment, was under con-

sideration the Commission believed that it would become a law, and prepared to meet its terms and conditions by receiving tentative applications from each citizen for 160 acres of land. The Original Creek Agreement did, in fact, verify the belief of the Commission that this plan would be eventually carried into effect for it provides for 160 acres of land as a standard allotment and provides for equalizing the allotments. In this connection we direct attention to the positive statements by the Commission that much of its work in the Creek Nation was provisional, that the allotments were preliminary, that the lists of citizens were merely lists for final enrollment, that the lands would ultimately be allotted upon terms agreed to by the Creeks themselves. This history considered, it is clear to the point of demonstration that the Commission never undertook to allot in the Creek Nation under section 11 and that no Creek ever deemed that he was allotted under section 11. It is a well known fact of history in the Creek Nation that these tentative allotments were made in virtue of the proposed agreements which failed, and not under section 11.

The case of *deGraffenried v. Iowa Land & Trust Company*, 20 Okla. 687, 95 Pac. 624, decided April 13, 1908, is a land mark in Oklahoma, and, as was recently held by this court, the rules therein announced have become rules of property. The distinguished counsel, who is the latest acquisition to the legal talent opposing us, and who now puts forward

the proposition that this is a Curtis Bill allotment under section 11, was the successful counsel in the *deGraffenried* case. In his learned brief filed in the Supreme Court of the state in that case he stated the true history and the belief of the bench and the bar as to allotments taken before the Original Agreement as follows, commencing at page 11 of that brief:

"In 1897 the Commission to the Five Civilized Tribes negotiated an agreement with the Creeks which was approved by Congress on June 28, 1898, but which never became effective because it was not ratified by the Creek Nation. * * * The Commission to the Five Civilized Tribes, although this agreement had not been ratified by the Creek Nation, proceeded to carry out the provisions of said agreement and allot the lands. A great many allotments were made under this agreement made in 1897, and among the number was that of Castella Reeves, *nee* Brown. As shown by the agreed statement of facts, she selected her allotment on April 22, 1899, and received from the Commission on that date a certificate for the same, numbered 1330."

And again, at page 21, he states:

"But as heretofore stated, the agreement negotiated in 1897 and approved by Congress but not ratified by the Creek Nation, never became effective, although the Commission to the Five Civilized Tribes proceeded to act under its provisions and make a considerable number of allotments."

While we admire the mental agility of our latest and most vigorous opponent, his brief now

submitted to this court shows a "variableness or shadow of turning" not justified, in our humble judgment, by the historical facts. If the point was ever in doubt, it is now entirely too late to consider overturning the decisions of the courts hereinafter cited, for to do so would create intolerable confusion in land titles in that part of Oklahoma formerly Indian Territory.

In Welty v. Reed counsel by mistake conceded that the allotment thus made under Sec. 11 Curtis Act. This led the court into error.

We suggest the point that it did not lie with Congress, without the consent of the tribe, to dispose of their lands, and that therefore had the allotment been made under section 11 of the Curtis Act it was not final or effectual as against the tribe or the United States.

—*Choate v. Trapp*, 224 U. S. 665, 56 Law ed. 941.

But if the allotment in question had been made under section 11 of the Curtis Bill, Congress could have undone all that had been done by way of allotment. There was no provision for a title. No provision was made for the acquisition of any right in the allottee which might ripen into a title. The minerals were expressly excluded from allotment. The selection did not carry with it even the inception of a title. Under section 11 the Commission was merely authorized to make preliminary allotments in certain tribes other than the Creek Nation, thereby

giving to the allottee merely the tribal right to the surface. Theretofore the surface right had belonged indiscriminately to all the members of the tribe to be taken by him who could first reduce it to possession but, as appears by various references in the Acts of Congress relating to the Indian Territory, some members of certain tribes had reduced a vast amount of the land to possession, a few individuals were reaping the profits of almost countless acres. At the most, section 11 only individualized, for the time being, and until further action by Congress, the tribal possession, thereby enabling each allottee to expel other members of the tribe from the particular tract of land. *After allotment under section 11 the situation was exactly in any tribe as it would have been had the tribe itself partitioned the lands without any action upon the part of Congress.* Suppose the Choctaws had partitioned their lands after the plan set forth in section 11 of the Curtis Bill. When each citizen had taken possession of his allotment or portion of land, he would have had the right to the undisturbed possession of the same as against other members of the tribe like as under the allotment of section 11, but such a partition by the tribe itself would not have vested in the individual members of the tribe any right as against the government. Allotment under section 11 did vest in the allottees tribal rights as against other members of the tribe, but did not vest in them any right, title or interest which the government was bound to respect.

The situation was somewhat like homestead cases where provision is made for entry of public domain and for the ripening of a title. In such cases an entryman may acquire the prior right to take the land as against all other persons, but as against the government his entry and preliminary steps looking to the acquisition of the title amount to nothing if Congress desires to withdraw the lands from the operation of the law.

The case of *Wallace v. Adams*, 143 Fed. 716, fully establishes the proposition that after the selection of allotments under section 11 Congress could have changed the plan.

Where, then, did the so-called Curtis Act allottees get their first right to the land as against the Government of the United States? It was by the Original Creek Agreement which provided the plan or scheme for the dissolution of the tribal government and for the allotment of the lands. The case of *United States v. Jacobs*, 195 Fed. 708, contains this statement:

“From the facts it appears that a Commission provided by Act of Congress to the Five Civilized Tribes of Indians found that Pearly Jacobs, a minor, was a freedman member by adoption of the Creek Nation or Tribe of Indians on the first day of April, 1899, and as such was entitled to an allotment of land. She having died before the allotment was made, the allotment was made to her heirs, and patents were issued to them. The statutes under which these allotments were made were Act of March

1, 1901, c. 676, 31 Stat. L. 861, and Act of June 30, 1902.”

This case illustrates how the courts have looked to the Original Creek Agreement as the first authentic provision for allotment of lands in the Creek Nation. Here it is stated that the Freedmen allotments were made under the Original and the Supplemental Creek Agreements. The same is true of the Indians. To hold that a so-called Curtis Bill allottee acquired an *inheritable* interest in his land before the Original Agreement and that same descended under the Arkansas law, extended in force in the Indian Territory, would be to introduce a novel and disturbing element into an already distressed situation in the east half of Oklahoma, which was the Indian Territory.

The Original Creek Agreement provided a scheme of allotment whereby every Creek citizen living on April 1, 1899, should receive an allotment, or, in the event of his death, that the same should be made to his heirs. No citizen who died prior to April 1, 1899, under the terms of this allotment scheme was entitled to an allotment or to any moneys of the tribe. *United States v. Jacobs*, 195 Fed. 708. But the Curtis Bill provides for allotments to all citizens living on June 28, 1898, and to their descendants. See quotations above. In short, under the provisions of section 11 allotments were to be made to every person, Indian or Freedman, entitled to citizenship in the tribe living at the time

the Curtis Bill was enacted, and to all their descendants. But many persons died between June 28, 1898, and April 1, 1899. What about them? Plaintiff in error must take the position that all citizens living on June 28, 1898, were entitled to allotments. He says in effect, that all persons then alive had a right to take allotments and when so taken that they became vested with an inheritable interest which passed under the then existing laws of descent. Here is a pitfall he cannot escape. To hold that those living on June 28, 1898, were entitled to allotments though they may have died prior to April 1, 1899, is to undo the work of the Commission. It is well known that the United States is now maintaining many suits to cancel allotments in the Creek Nation upon the ground that it was fraudulently represented that the citizens were living on April 1, 1899, and the courts permit cancellations in cases of this sort. But the right to take an allotment in an action of this sort by the government is equivalent to the allotment, and if the plaintiff in error should be sustained, then in all those cases where the citizens were living June 28, 1898, but died before April 1, 1899, the government must be defeated, for if the right to allotment dates back to June 28, 1898, and was a descendible right, though a "floating" right, it is one which the heirs can now assert. Such a construction would open the rolls again. *Woodbury v. United States*, 95 C. C. A. 498. This contention by the plaintiff in error squarely presents for the court's de-

cision the question whether the right to an allotment in the Creek Nation must be regarded as of April 1, 1899, as provided by the Original Agreement, or as of June 28, 1898, as provided by the Curtis Act. We present this query: Since under the Curtis Bill there was a provision for every one then alive to have an allotment, suppose A and B, both then alive, had presented themselves for selection and had received certificates, but A dies before April 1, 1899; B lived until after that date. But the Original Creek Agreement provides that no citizen shall receive an allotment unless living on April 1, 1899. What is the result as regards A and B? Under the theory of plaintiff in error the heirs of the dead man must have an allotment. This is a contention never made before, so far as we know, and certainly not in accord with the provisions of the Original Creek Agreement. But the logic advanced for plaintiff in error would lead to this result.

The Original Creek Agreement contained the first provision for the passing of the title, Sec. 23.

The Act approved March 1, 1901, ratified by the Creeks May 25, 1901, 31 Stat. 861, known as the Original Creek Agreement, was not only the first scheme accepted by the Creeks for the allotment of their lands, but it was the first plan enacted by Congress for *final* allotment. Section 6 of this agreement provides as follows:

“All allotments made to Creek citizens by said commission prior to the ratification of this

agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said commission."

Everything before that date was merely *preliminary*. The Original Creek Agreement made provision for the making and approval of the *final rolls* of the tribe. *Up to that point there had been no final enrollment of any citizen.* At page 29 of the eighth annual report of the Commission to the Five Civilized Tribes to the Secretary of the Interior for the year ended June 30, 1901, the Commission accurately described this situation as regarding the Creek Rolls, where it is said that the persons whose names had been received "were listed for enrollment." Continuing and to the same point, the commission stated, "Up to the date of the ratification of the agreement there had been *listed for enrollment* by the Commission 10026 Indians and 5151 Creek Freedmen. As no provision is made in the agreement for citizens who died prior to April 1, 1899, and as a large number were *listed for enrollment* before that date, it is probable that a number of these had died and will not therefore be enrolled,

thus making the number that will be placed upon the final rolls smaller than it now is."

At section 28 of the Original Creek Agreement, there is this provision: "The rolls so made by said Commission, when approved by the Secretary of the Interior shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and distribution of all moneys and other property of the tribe shall be made and to no other persons." It is a well known fact of Creek history that the final rolls of the tribes made and submitted by the Commission under the provisions of the Original Creek Agreement were approved by the Secretary of the Interior in March, 1902, to-wit: On the 13th and 28th days of that month. Therefore the final enrollment of Agnes Hawes, whose allotment is in controversy here, was not completed until March, 1902. It is apparent, as suggested by the Commission in its 1901 report that many of the persons proposed for enrollment and allotment by the Curtis Act were denied final enrollment and allotment. It must be borne in mind that if section 11 of the Curtis Bill applied at all to the Creek Nation, it required the enrollment and allotment of all members of the tribe living on the 28th day of June, 1898. The very fact that Congress, with the consent of the tribe, provided a new method for making the rolls and changed the date at which would be reckoned the partition of the land shows that if section 11 had any application to the Creek tribe it was *merely in preparation for actual*

and final allotment. When the lists were prepared for enrollment, they were subject to verification to eliminate those that were improperly on the rolls. The courts have held repeatedly that it was the approval of the Secretary which fixed the citizenship of a member of the tribe. Prior to the approval by the Secretary, *the preliminary lists* were subject to revision by the Commission. The striking of a name from the lists necessarily carried with it the nullification of that applicant's *temporary allotment*. The citizen whose name was stricken from the temporary rolls by the Commission had the right under the law to appeal to the Secretary in an effort to save his enrollment and allotment, but in every case the action of the Secretary was final unless relief was had in court by an appropriate action.

The case of *Woodbury v. U. S.*, 173 Fed. 302, 95 C. C. A. 498, is in point here. Congress provided for allotments to the Indians of White Earth Reservation in Minnesota, the same to be made *after the completion of the tribal rolls*. It was impossible to determine *how many acres each citizen was to receive before the completion of the rolls*. The court held that an application made prior to the completion of the rolls was *premature*; that considerable preliminary work was required before allotment; that it was necessary before allotment to compute the number of acres of unappropriated lands and then to determine the number of citizens so that the land might be divided *pro rata*. The court said re-

ferring to the period of this preliminary work "During all this time it is manifest that no application could be entertained from any member of the tribe for his selection of any specific tract for two reasons: (1) such a practice would have given the applicant an unjust advantage over the other members of the tribe and would have been contrary to the established custom of the department in such cases; (2) until the rights of the Otter Tail band were determined neither the number of Indians who were entitled to participate in the allotment nor the amount of individual allotments could be known." Continuing, the court said, "Under the statute, allotments did not take effect until they were approved by the Secretary of the Interior." The *Woodbury* case accurately describes conditions in the Creek Nation prior to the Original Creek Agreement. There must have been before any allotment under section 11, *first, the completion of the rolls; second, the classification and appraisement of the lands* so that each citizen might have his *pro rata* share, moreover, there must have been an approval of the allotments by the Secretary of the Interior before same could have validity.

The allotments confirmed by section 6 of the Original Creek Agreement were taken subject to the following important condition: "And the same shall as to appraisement and *all things else* be governed by the provisions of this agreement." One of the provisions was that the Creek law should

govern the descent of all the allotments. Another provision was, no citizen's right to enrollment (to say nothing of allotment) was to be complete until approval by the Secretary of the Interior. The provision subjecting all the confirmed allotments to the terms of the Original Creek Agreement is in thorough accord with the action of Congress in treating the allotments as merely preliminary and in accord with the oft repeated declaration of the Commission that the lands would be allotted finally under the terms agreed to by the Creeks themselves.

Why was there need of confirmation? The answer is found in this: the preliminary allotments theretofore selected had not been made in compliance with the law; they were without validity; they were made valid by the confirmation in section 6, so that those who had theretofore received a preliminary allotment were in all respects placed in the same situation as those who selected their allotments after the Original Creek Agreement. But if the court should hold that these preliminary allotments were made lawfully under section 11 of the Curtis Bill, still the Curtis Bill allottee, having received nothing except the tribal surface right, confirmation was necessary to effect final allotment. Though the court should hold that the allotment in question was received under the Curtis Bill, it must also hold that the incipiency of the title is found in section 6 of the Original Creek Agreement. If the Curtis Bill allottee had no inchoate title or any right which he

could ripen into a title, there was no necessity for confirmation.

Here there should be considered the words in section 6, "not herein otherwise affected." Congress recognized that it had power to take away all the allotments theretofore made in the Creek Nation and it was thought that some of the provisions of the Original Agreement would have that result.

Section 28 of the Original Creek Agreement provides as follows:

"(28) No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

All children born to citizens so entitled to

enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

Observe that portion of section 28, as follows: "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled * * * shall be placed upon the rolls to be made by said Commission * * * and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands *and distributive share of all the funds of the tribe*, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly." None of the Creek citizens had received their distributive share of all the funds of the tribe. But section 28 clearly states that in all cases where citizens had died or should die before receiving their allotments and

all the funds to which they would have been entitled to had they lived, that their *pro rata* part should have been *allotted to their heirs under the Creek law*. *To receive an allotment within the meaning of this act was to receive a final, not merely a preliminary allotment*. Agnes Hawes had not received a final allotment. She had not received her distributive share of the funds of the tribe. *Therefore under sections 6 and 28 of the Original Creek Agreement, the land was allotted to and descended to her heirs under the Creek law*. Technically speaking, there was no descent, but the Creek law was invoked to determine the heirs who would take the lands and funds and proportion which each heir would receive.

III.

The Original Creek Agreement at Sections 6 and 28 confirmed to the heirs of Agnes Hawes, as said heirs were determined by the Creek law and in the proportions provided for in that law, the temporary allotment selected by Agnes Hawes and made the same a final allotment in the hands of the heirs. At final allotment the right to patent, vested for the first time. The case of *Washington v. Miller*, 235 U. S. 422, is decisive of this case in favor of the defendant in error.

Let us examine the various sections of the Original Creek Agreement providing for allotment. We will classify these provisions as follows: (1) At section 6 it is provided, as regards all citizens then

living who had selected allotments, theretofore, that their allotments were confirmed, thereby avoiding the necessity of another selection. (2) In section 7, and elsewhere, provision is made for all citizens living who had not selected their allotments to select same, and if they failed to select, allotments were to be made arbitrarily. (3) One of the provisions of section 28 is to the effect that where a citizen living at the time of the adoption of the agreement might die without receiving his allotment, the same should be selected for, allotted to and should descend to his heirs under the Creek law. The provisions just referred to cover all the cases except where the citizens had selected their allotments and had died prior to the Original Agreement. These cases are provided for by sections 6 and 28 which have the effect of confirming in the heirs under the terms of the Creek law the allotments which their ancestors would have received had they lived until the Original Agreement. *Here is the central point in this entire controversy*, and here lies the one difficulty that the plaintiff in error cannot surmount. Congress expressly confirmed in the heirs of Agnes Hawes the temporary allotment which she had selected in her lifetime and to determine who would take the land, provided that the heirs should be determined by the Creek law. The result is the same as if Congress had said in express words—Agnes Hawes was living April 1, 1899, and selected a temporary allotment, acquiring the surface right there-

to as against other members of the tribe, but having died before there was any provision of law to vest in her any title, that land is hereby allotted to the heirs of Agnes Hawes as the heirs are reckoned under the Creek law and said heirs shall receive the same as if by descent and as if said Creek law had been in force at the date of her death, and just as if said allotment had been final in her lifetime. We do not understand counsel for plaintiff to contend that Congress lacked the power or authority to allot this land to the heirs under the Creek law or to confirm it in the heirs under the Creek law, which comes to the same point. That Congress intended to allot and cause the land to descend to the heirs under the Creek law and to be confirmed in them according to the provisions of that law, there can be no possible doubt. In truth, the language is so clear that it needs no construction. This point in itself, without further consideration, ought to make an end of this whole controversy. Agnes Hawes having died before the Original Creek Agreement, it was impossible to confirm the allotment in her. Congress did not attempt that. Can it be doubted that Congress might have refused to confirm these allotments? Had Congress so refused, the heirs would have taken nothing in the allotment of Agnes Hawes except the Indian right of occupancy, because it took this confirmation to make the same final and effectual. Congress, with the consent of the tribe, also at the time of the confirmation designated the heirs to take under that confirmation.

The word "heirs" throughout the Original Creek Agreement has a uniform meaning. It was used every time to refer to those who would take under the Creek law of descent and distribution as was held by this court in the case of *Washington v. Miller*, 235 U. S. 422. Mr. Justice Van DEVANTER, in the *Washington-Miller* case, after referring to the use of the word "heirs" in various parts of the agreement, states, in the court's opinion:

"In other parts of the agreement the word 'heirs' was used without any accompanying explanation of who was intended, but this evidently was because the word was intended to have the same significance as in sections 7 and 28. Therefore, no further explanation was necessary."

The learned justice before using this language, had just made the comment that the Creek law of descent and distribution was used every where in the Original Creek Agreement to designate the heirs. It must be granted, therefore, that it was the intention of Congress to confirm the allotment of Agnes Hawes and to allot the same to her heirs under the terms of the *Creek law*. The *Washington-Miller* case is decisive of all the questions of descent in dispute in this case, for to hold that by "heirs" in the Original Creek Agreement everywhere means "heirs" under the Creek law, is to say that Congress and the Creek Nation allotted this land under the Creek law to the heirs of Agnes Hawes.

Prior to the Original Creek Agreement no right to a patent vested, *Ballinger v. Frost*, 216 U. S. 240. *The case of Skelton v. Dill*, 235 U. S. 206 holds that all allotments made in the Creek Nation for the benefit of the heirs after the death of citizens are unrestricted because made *under the terms* of the Original Creek Agreement which imposes no restrictions on such lands. This court must have referred to *final allotments* for benefit of the heirs. Therefore *Welty v. Reed* relied upon by plaintiffs in error is in conflict with *Skelton v. Dill*, where this court cited *with approval* the decision of the lower court reported as *Reed v. Welty*, 197 Fed. 419.

IV.

Oklahoma cases holding that the Creek law governed in all cases where "Curtis Bill allottees" died after the selection of their allotments and prior to the Original Creek Agreement.—Rule of Property.

In the case of *Barnett v. Way*, decided November 14, 1911, 29 Okla. 780, 119 Pac. 418, the Supreme Court of the state held:

1. "INDIANS—*Creek Lands—Descent and Distribution.* The descent and distribution of the allotted lands of an enrolled Creek Indians, who died before the ratification of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), and who had during her lifetime allotted to her under section 11 of the Curtis Act (Act June 28, 1898, c. 517, 30 Stat. 495) the use and occupancy of the surface of the allotment,

which was thereafter by section 6 of the Original Creek Treaty ratified and deed issued to her heirs therefor, is, by reason of section 28 of the Original Creek Treaty, regulated and controlled by the law of descent and distribution of the Creek Nation.

2. *Same.* In determining who are the heirs of a deceased enrolled Creek Indian, who during her lifetime received the allotment of the use and occupancy of an allotment, which, after her death, was ratified to her heirs by virtue of section 6 of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), the laws of descent and distribution of the Creek Nation are to be applied as if the deceased Indian had received title to her allotment during her lifetime and died seized thereof.

3. *Same.* An enrolled Creek Indian died February 8, 1900, and left surviving her as her relations her father, some brothers and sisters, some of whom were the children of the father and mother of the deceased and others were the children of the father by a former wife, not the mother of the deceased, and also left a half-brother and the children of a half-sister, who were children of the deceased's mother by other husbands than the father of the deceased. The deceased's father died on March 17, 1900. *Held*, under section 28 of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), the children of the father inherited the allotment of the deceased to the exclusion of the half-brothers and the children of the half-sisters, who were the children of the deceased's mother."

It appears that in that case it was conceded that the allotment was made under section 11 of the

Curtis Act of June 28, 1898, and the court, perhaps because of the confession, spoke of the allotment as having been made under section 11. The conclusion reached by the court in that case, which is exactly like the one here submitted, is sound, but if the question were doubtful, conditions in the eastern half of Oklahoma, considered the rule has stood too long to be overturned without great confusion. This is a country of rapid progress. Many conveyances have been made upon the faith of the *Barnett v. Way* case and other opinions of like kind. *A rule of property has been established.* For this reason it did not occur to counsel for plaintiff in error to question the application to the Creek law until they were defeated by the Supreme Court's construction of the Creek law in the cases of *Shellenbarger v. Fewell* and *Reynolds v. Fewell*, decided January 18, 1915.

The case of *Divine v. Harmon*, 30 Okla. 820, 121 Pac. 219, follows the case of *Barnett v. Way*, thus:

“INDIANS — *Lands — Allotment — Descent.* Will S. Harmon, an enrolled Creek Indian, prior to the ratification of the ‘Original Agreement,’ on May 27, 1901, selected and had allotted to him by the Dawes Commission an allotment in the Creek Nation, upon which he was residing with his wife at the time of his death, March 1, 1900. His only heirs were his wife, two brothers, and one sister, there being no children nor descendants of children, nor father nor mother, nor grandfather nor grandmother. After May 27, 1901, the wife brought suit for partition of said allotment. *Held:*

First. That by virtue of Sec. 6 of the said 'original agreement' the allotment so taken was ratified and confirmed in all things as though selected after May 27, 1901.

Second. That immediately upon his death March 1, 1900, his heirs, by virtue of Sec. 28 of said 'original agreement,' became vested with the fee of his estate in said allotment.

Third. That his heirs are to be determined by virtue of the Creek law of descent and distribution in effect at the time of his death.

Fourth. That the devolution of said estate was governed by the Creek law of descent and distribution, which should be applied as if the deceased had received title to his allotment during his lifetime, and was seized thereof, but inasmuch as there was no estate in said land until the ratification of the 'original agreement,' which was after his death, the said law would not apply until that time, to-wit, May 27, 1901."

The Oklahoma cases apply the Creek law as the date of the death of the citizen who died before final allotment.

A review of the Oklahoma cases which apply the Creek law of descent show that prior to the case of *Barnett v. Way* no distinction was ever made by counsel or by the court between cases where the allottee had selected his allotment and died prior to the Creek Agreement and cases where the allottee was living when the Creek Agreement became a law and died under that law after the selection of allotment, which goes to show that the decisions of the

Supreme Court of Oklahoma on this point should not be disturbed. Too much land litigation has become a curse in that part of Oklahoma, formerly the Indian Territory. The uncertainty of land tenures and titles has depreciated the market value of the lands. This condition of affairs is vastly detrimental both to the Indians and to the whites. We earnestly insist that the Supreme Court of Oklahoma should not be reversed in a case of this sort except for powerful considerations—for manifest error. The opinion of the Supreme Court of Oklahoma in this case (Record, printed p. 76) is well reasoned and in our judgment thoroughly sound, but if the matter is in doubt that doubt should be resolved in favor of stability of land titles.

V.

The Creek law of descent was intended to govern the devolution of all Creek allotments, both surplus and homestead, whether allotted direct to citizens or for the benefit of their heirs after the death of the citizens entitled to receive allotment.

Plaintiff in error makes now for the first time the contention that it was never intended by Congress that the Creek law should apply except to control the devolution of the forty-acre homesteads set aside to the Creek allottees and to determine the heirs who would take in cases where the allotments were made to the heirs. This contention was one

of the first put to rest by the Supreme Court of Oklahoma in the leading case of *deGraffenried v. Iowa Land & Trust Company*, 20 Okla. 687, 95 Pac. 624, 633, the Supreme Court holding that it *was never the intention of Congress to provide two separate and distinct laws of descent applicable to different classes of Creek lands* to be in force at the same time. Surely no legislative body ever did such a foolish thing. It is difficult enough for an advanced people to understand and apply one scheme of descent. It is more difficult for this dependent tribe of Indians at the point of dissolving the tribal government. How absurd to assert that Congress intended to put upon these simple people the burden of understanding and applying at that period of their development two very different statutes of descent. Sections 6, 7 and 28 of the Original Creek Agreement considered together make it plain that the Creek law governed all of the allotted lands. Disposing this matter in the early *deGraffenried* case, *supra*, the Supreme Court said:

“The report of the Dawes Commission shows that from April 1, 1899, the date of the opening of the allotment office at Muskogee, up to June 30, 1901, 10,617 persons had appeared before it, and made application to select allotments. Of this number 9,557 received preliminary allotments of 160 acres, and 1,060 made partial selection, covering in all 1,626,917 acres. Section 6 of that act confirmed those allotments, and of necessity that many enrollments, and provided that they ‘* * * shall, as to appraise-

ment and all things else (which includes as to how they shall go on descent cast) be governed by the provisions of this agreement; and said commission shall continue (not go behind) the work of allotment of the Creek lands to citizens of the tribe as heretofore, conforming to provisions herein. * * *

This fixed the status of those allotments, including that of Castella Brown. Then, as if to dispose of the whole subject of the descent of all allotments which had been made or would be made thereunder before descent cast, the agreement provides: '*Sec. 7. Lands allotted to a citizen hereunder (which includes that of Castella Brown) shall not in any manner whatsoever or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior. * * * (Limitation.) Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years (another), for which he shall have a separate deed, conditioned as above: *Provided*, * * * the homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue (Castella Brown had none) then he may dispose of his homestead by will (she made none) free from limitation herein (the last above) imposed, and if this be not done (no will made) the land (what land? The homestead? No, or it would*

have said so. What lands are we talking about? Lands allotted to citizens hereunder—the whole allotment) shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation.' What limitation? The last above on the homestead. Hence, as the lands in controversy were 'lands allotted' within the purview of the first words of this section, they fell squarely within it, and their devolution is governed according to the laws of descent and distribution of the Creek Nation in force at the time of the death of Castella Brown.

But there was a vast number of citizens of the Creek Nation who were entitled to be enrolled when the land office opened April 1, 1899, but who, up to the time of making this agreement had not been enrolled, several of whom had died, and others who might die before receiving their allotments. Accordingly it was provided in the same agreement: 'Sec. 28. All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be (not those who had been) enrolled under (section 21 of the Curtis Bill) shall be placed upon the rolls to be made (the names already enrolled were to stand) by said commission under said Act of Congress, and if any such citizen (*i. e.*, one entitled to enrollment on April 1, 1899) has died since that time, or may hereafter die, before receiving his allotment of land and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.' In short, sec-

tions 6 and 7 of this agreement fix the descent of the allotment (both surplus and homestead) in cases where the allottee receives his allotment before he dies, and section 28 fixes it in cases where he dies before receiving his allotment. In either case it was intended to 'descend to his heirs according to the laws of descent and distribution of the Creek Nation.' This, we think, is a literal construction of these sections, as was intended. 'The land' referred to in section 7, and the 'the lands' referred to in section 28, mean one and the same thing, and both have reference to the entire allotment. This meaning must be given to 'the land' referred to in section 7, in order to carry out the intention of Congress. To confine it as simply referring to the homestead would convict Congress of a grave oversight, or as intending an absurdity, in that under both statutes the homestead would descend under the laws of descent and distribution of the Creek Nation. Under section 28 the surplus would also so descend, while under section 7 the surplus would descend under the laws of descent and distribution of Arkansas, as set forth in chapter 49 of Mansfield's Digest (Ind. Ter. Ann. St. 1899, c. 21). This would create endless confusion, and hence we will not attribute to Congress any such intention. Black on Interpretation of Laws (section 30) says: 'Every statute is construed with reference to its intended scope and the purpose of the Legislature in enacting it; and when the language is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute'."

The deGraffenried case is a rule of property on this point. It has been followed uniformly in many a case. It would be a very great calamity to that part of Oklahoma, formerly the Creek Nation, for the *deGraffenried* case to be overturned in this respect. Thousands of titles have passed under the rule of the *deGraffenried* case, whereby it was held that the entire allotment, whether allotted to the heirs or direct to the citizens first entitled to the same, descended under the Creek law.

Counsel cites the case of *Bartlett v. Okla Oil Company* decided by the United States Court for the Eastern District of Oklahoma, 218 Fed. 380, and states that the United States Court here refused to follow the rule of the *deGraffenried* case. They have inadvertantly fallen into error. The United States Court for the Eastern District of Oklahoma had no such question before it. It passed upon no such question. On the other hand the point discussed and decided was, *Did the law of Arkansas extended in force in the Indian Territory* govern in a case where a Creek allottee died in 1907 after statehood, rather than the Oklahoma statutes? The learned judge undertakes to give a history of the various legislative acts relating to the Creek tribe and by way of recital, the point not being involved even indirectly, made a remark to the effect that the Creek law of descent governed only the devolution of the Creek homesteads actually received by the allottees and the allotments made direct to the heirs.

In the case of *Washington v. Miller*, decided November 14, 1914, 235 U. S. 422, 59 Law ed. 119, there was involved the entire Creek allotment, both homestead and surplus and this court treated the Creek law as applicable both to the homestead and surplus and all allotments whether made to the living in their own right or to heirs of deceased citizens. In that case the court said:

“Notwithstanding the situation just mentioned, provisions were inserted in the Original Creek Agreement of March 1, 1901, *supra*, which undoubtedly gave controlling effect to the Creek tribal laws rather than to the Arkansas law; and those provisions embraced allotments to living citizens as well as allotments on behalf of deceased citizens. Thus in section 7 it was provided that if, after a homestead had served the purposes of its creation, the allottee should die intestate, the land should ‘descend to his heirs according to the laws of descent and distribution of the Creek Nation;’ and in section 28 it was provided that, if a citizen or child entitled to enrollment should die before receiving his allotment and share of the funds of the tribe, the lands and money to which he would be entitled, if living, should ‘descend to his heirs according to the laws of descent and distribution of the Creek Nation.’ In other parts of the agreement the word ‘heirs’ was used without any accompanying explanation of who was intended, but this evidently was because the word was intended to have the same signification as in sections 7 and 28, and therefore no further explanation was necessary.”

VI.

If the allotment involved was made under Section 11 of the Curtis Bill the allottee took only the Indian title, "the exclusive use and occupancy," exclusive of the minerals and nothing more, and the interest of the allottee therein, the same being a mere possessory right, was subject to further legislation and agreement, and even though it should be held that this right passed to the heirs by descent, it was not a vested right as against the government and the Creek Nation in the matter of final allotment and distribution of the lands.

At page 64 of their substitute brief, counsel for plaintiff in error discover for themselves the true character of the interest acquired by the Curtis Bill allottee. Preparatory to further legislation she took the *Indian title*. According to the laws and customs of the Creek Nation the members of that tribe had the right to fence and till the surface of the land and to acquire for themselves the exclusive use thereof against other citizens. Their improvements placed upon the public domain of the nation, together with the possessory right thereto, passed to the heirs. Congress recognized this possessory right in the final distribution of the lands and made the allotments to conform as nearly as possible to the land actually occupied by the members of the tribe. But Congress was not bound to set aside and allot to any Indian the particular tract of land

which he had reduced to possession. Whilst we are clearly of the opinion that the allotments were made under that part of the Curtis Bill proposed to the Creeks for ratification which never became a law, yet if we are in error about this and they were made under section 11, the same result is reached, for the allottees had no rights under the Curtis Act, which Congress could not control. We conclude that if the allotment was made under section 11 of the Curtis Act and if the allottee's interest therein descended to the heirs, Congress had full authority when the allotment was confirmed in the heirs to designate who would take the allotments and the proportions in which they should be received by prescribing the law of descent. The possessory right to the surface could in no manner interfere with this plenary power of Congress.

The situation was analogous to that found in the townsites in the Creek Nation. Certain members of the tribe had acquired a prior right of occupancy of the townsites by reason of actual possession and improvements, but on that account Congress was not required to allot to the Creek citizens in possession of the town lots or to sell to them all the lots in the towns upon the reduced payments provided for in the Original Creek Agreement. On the other hand, these citizens in possession of the townsites were expressly required to surrender all of their possessions except very limited portions. They could have certain lots and blocks upon con-

ditions named in the treaty, but all the rest had to be surrendered to any who desired to take the same upon the conditions provided in the treaty. But without doubt these occupants of the townsites had long had the Indian right of possession which passed to heirs upon the death of those in possession.

The case of *Sizemore v. Brady*, 235 U. S. 441, 59 Law ed. 135, is in point here. There the Creek citizen was living when the Original Agreement became a law and died within the period when the Creek law of descent controlled Creek allotments, that is to say, before July 1, 1902, not having selected the allotment. The allotment was selected for the heirs after the Arkansas law extended in force in the Indian Territory was made applicable to Creek lands. It was held that the Arkansas law controlled the devolution of the property and not the Creek law. Having died before the right to take the allotment had been fully exercised and completed by actual and final selection, Congress had the authority to prescribe a different rule of descent to determine who would take the land when set apart for the heirs. The court said:

“On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in praesenti*, and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an abso-

ulte right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the 5th Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe, or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled if living. In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U. S. 665, 671, 56 L. ed. 941, 944, 32 Sup. Ct. Rep. 565.

In principle it was so held in *Gritts v. Fisher*, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580. There an act or agreement of 1902 had made provision for allotting and distributing

the lands and funds of the Cherokees in severalty among the members of the tribe who were living on September 1, 1902, and an Act of 1906 (34 Stat. at L. 137, chap. 1876) had directed that Cherokee children born after September 1, 1902, and living on March 4, 1906, should participate in the allotment and distribution. By enlarging the number of participants the later act operated to reduce the distributive share to which each would be entitled, and because of the validity of that act was called in question, the contention being that the prior act confined the allotment and distribution to the members living on September 1, 1902, and therefore invested them with an absolute right to receive all the lands and funds, and that this right could not be impaired by subsequent legislation. This court rejected the contention and said (p. 648): 'No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the Act of 1902 as a contract, when "it is only an Act of Congress and can have no greater effect." *Cherokee Intermarriage Cases*, 203 U. S. 76, 93, 51 L. ed. 96, 103, 27 Sup. Ct. Rep. 29. It was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect, and while the tribal relations continued. *Stephens v. Cherokee Nation*, 174 U. S. 445, 488, 43 L. ed. 1041, 1056, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed.

183, 23 Sup. Ct. Rep. 115; *Wallace v. Adams*, 204 U. S. 415, 423, 51 L. ed. 547, 551, 27 Sup. Ct. Rep. 363'."

The case of *McKee v. Henry*, by the Eighth Circuit Court of Appeals, 201 Fed. 74, holds that prior to final allotment Congress could have repealed legislation providing for allotment and have restored the old system of tribal control. The court used this language:

"It must be remembered that this land was in only partially organized territory of the United States at the time in question, and the Constitution provides:

'The Congress shall have power to * * * make all needful rules and regulations respecting the territory * * * belonging to the United States.' Section 3, article 4, of the United States Constitution.

That is to say, Congress had full power to make laws of descent in Indian Territory, independently of the Indians or other people residing there; but the Muskogee or Creek Tribe of Indians were under the special guardianship of Congress, and it had plenary authority over them. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. ed. 299.

It is not meant that Congress could defeat the Indian title which was held under patent from the United States, much less that a title once allotted could be disturbed. *Choate v. Trap*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941. But it had full and ample authority to fix the laws of descent, with or without the consent of the Indians, both under its guardianship

of the Indians and their property, and under its power to make all needful rules and regulations respecting the territory belonging to the United States. It had this power to make laws by agreement with the Indians, but it beclouds the issue if it be assumed that such agreement was necessary when it was not. These lands belonged to the Indians as a tribe so long as the tribe existed and they occupied the land, with reversion to the United States; but no part of these lands belonged to any specific Indian. The Muskogee or Creek tribe was in the nature of a dependent nation; and as our national public buildings belong to the nation, the citizen, while he has an interest in them, has no share in the title to them, so these lands, so far as the Indian title was concerned, belonged to the tribe as a community, and no separate Indian had any title whatever, severally or as a tenant in common. No law or agreement to divide the lands in severalty had any effect to create such a title until the lands were actually allotted. All these laws contemplated that the tribe, through its members, would receive substantially the whole reservation in lands or money. If the right to lands was vested after enrollment and before allotment, then why was the interest of the Indians not actually vested in the remaining lands and money? Yet it was expressly held in *Gritts v. Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. ed. 928, that the interest in the remaining lands and money was not vested, and that new participants could be added by Congress.

The enrolling primarily established the right of citizenship, and only incidentally conferred the right to allotment, and until allotment was made no inheritable right vested in the individual Indian.

‘The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.’ *Stephens v. Cherokee Nation*, 174 U. S. 445, 488, 19 Sup. Ct. 722, 738 (43 L. ed. 1041).

The title, so far as here pertinent, of the Creeks, was identical with the title of the Cherokees to their lands, and in *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, 23 Sup. Ct. 115, 120 (47 L. ed. 183), it is said:

‘Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. *The Cherokee Trust Funds*, 117 U. S. 288, 308 (6 Sup. Ct. 718, 29 L. ed. 880). The manner in which this land is held is described in *Cherokee Nation v. Journeycake*, 155 U. S. 196, 207 (15 Sup. Ct. 55, 60, 39 L. ed. 120), where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: “Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them.”’

As already suggested, if enrollment conferred a vested interest in any lands, why did it not confer a vested interest in any money or other property belonging to the tribe? Yet it

has been held that the power of Congress to admit new persons to the rolls, thereby depleting the amount which would go to those previously on the rolls, is political in its character, and not within the control of the courts. *Muskrat v. United States*, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246.

In *Woodbury v. United States*, 170 Fed. 302, 95 C. C. A. 498, this court characterized the right of an Indian long after his enrollment, but before allotment, as 'a mere float—giving him no right to any specific property.'

When the allotment was made for the first time the rights of any individual vested, and the title became vested in the one at that time fixed by the law, and it makes no difference what previous laws may have provided.

In the conclusion we have reached we find that we are in harmony with the Supreme Court of Oklahoma. *Brady v. Sizemore*, 124 Pac. 615; *Shellenbarger v. Fewel*, 124 Pac. 617.

While our conclusion has been reached upon the authority of the Supreme Court of the United States, of this court, and what seems to us sound reason, it is gratifying to find that there is uniformity in the decisions of the state court and this court.

At any time after allotment, and before allotment, Congress could have repealed all legislation providing for allotment, and have restored the old system of tribal control; and, if this is true, manifestly no inheritable interest vested in any one until allotment."

The case of *Welty v. Reed* insofar as it appears to hold that a Creek allottee took a final allotment

prior to the Original Creek Agreement, we respectfully submit, is unsound. That case involved a question of alienation. Section 7 of the Original Creek Treaty provides that lands allotted to citizens, that is, to living citizens, should be restricted as set forth in that section. There was presented to the Court of Appeals in the *Welty-Reed* case the question whether a temporary allotment made prior to the Original Agreement was an allotment to a citizen within the meaning of section 7 and within the meaning of section 16 of the Supplemental Creek Agreement. That case cannot be sustained at all unless it is held that by "lands allotted to citizens" referred to in section 7 Congress meant not only final allotments but temporary allotments. The allotment involved in the *Welty-Reed* case, like the one here, was allotted, that is, finally allotted, by the confirmation of the Congress itself as provided in section 6 of the agreement. However, the plaintiff in error cannot prevail here even if this court should adopt the view that by "lands allotted to citizens" Congress intended to include both temporary and final allotments. For the interest of the Curtis Bill allottee in his temporary allotment as shown above, was subject to legislative enactment.

VII.

The fact that Ratus Hawes murdered his wife does not operate as a forfeiture of his right to inherit her property.

The entire Creek law of descent was recently considered by this court in the case of *Shellenbarger v. Fewell*, decided January 18, 1915. This law consists of three sections quoted in full by the court in that case. The Creek statutes of descent, insofar as they affect the point here, provide:

“The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate if there are no other heirs, and an heir’s part if there should be other heirs, in all cases where there is no will. The husband shall inherit of a deceased wife in like manner.” Laws Muskogee Nation, c. 10, paragraph 8.

The plaintiff in error does not contend that the surviving husband murdered his wife *for the purpose of obtaining her property by inheritance*. The overwhelming weight of authority holds that the murder of an ancestor in the absence of a statute excluding the murderer from the inheritance, does not operate as a forfeiture of the rights of the heir in the estate of the ancestor.

—14 Cyc p. 61;

Owens v. Owens, 100 N. C. 240, 6 S. E. Rep. 794;

Deem v. Milliken, 52 Ohio State 668, 44 N. E. Rep. 1134;

Shellenbarger v. Ransom, 41 Neb. 631, 59 N. W. 935;

Same case, 25 L. R. A. 564;

Carpenter’s case, 170 Pa. 203, 32 Atl. 637;

Same case, 29 L. R. A. 145;

Same case, 50 Am. St. Rep. 765.

This is purely a matter of statutory provision and only the Creek statutes can be examined to determine how the descent was cast.

In the case of *Davison v. Gibson*, Circuit Court of Appeals, Eighth Circuit, 5 C. C. A. 543, the court held that the common law could not be invoked to determine descent under the Creek law, saying:

“Any controversy which involves the right of a husband to the personalty of his deceased wife, both of them being citizens of the Creek Nation, where there is no showing as to what was the law or custom of that nation applicable in the matter, it is error to presume that the common law was in force therein and to decide the controversy according to its rules.”

The proper punishment for crime is found in the Criminal Courts. Section 5326 of the Revised Statutes of the United States in force in the Indian Territory provides:

“No conviction or judgment shall work corruption of blood or any forfeiture of estate.”

Since Congress adopted statutes of descent which do not exclude an heir on account of his crime, the courts should not exclude him. This is purely a matter of legislation.

VIII.

Res Adjudicata.

We have discussed fully in our first brief filed for the defendant in error the question of *res adjudicata*, and have there shown that this is merely a question of local law and practice, but if the court should hold that it is a federal question, we have shown that plaintiff's point is not well taken.

Respectfully submitted,

THOMAS H. OWEN,

JOSEPH C. STONE,

Attorneys for Defendant in Error.

In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1914.

No. 164.

**PEGGIE WOODWARD, RICHARD WOODWARD,
VIOLA WOODWARD, et al., *Plaintiffs in Error,***

vs.

ROBERT P. de GRAFFENRIED, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF
OKLAHOMA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

**Allotment of Agnes Hawes Not Made Under Rejected
Creek Agreements.**

Following an argument that allotments made in the Creek Nation prior to the ratification of the Original Creek Agreement on May 25th, 1901, were not made under the Curtis Bill but under the rejected Creek Agreements opposing counsel state on page 37 of their brief: "It is a well known fact of history in the Creek Nation that these tentative allotments were made in virtue of the proposed agree-

ments which failed, and not under section 11," of the Curtis Bill. Dr. Cook was a great explorer, and opposing counsel are great historians.

The first agreement negotiated with the Creeks was made on September 27th, 1897 (Sixth Annual Report of the Dawes Commission, p. 9), and that agreement was embodied in section 30 of the Curtis Bill (30 St. L. 495) which expressly provided that "*the same shall be of full force and effect if ratified before the first day of December, eighteen hundred and ninety-eight*, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose." An election was held prior to December 1st, 1898, and the agreement rejected by the Creeks as reported by the Dawes Commission in its Sixth Annual Report for 1899, page 9. As the Land Office in the Creek Nation was not opened until April 1st, 1899, several months after the first agreement with the Creeks was rejected by the Creeks, it certainly cannot be said that the Commission allotted the lands under that rejected Creek Agreement. And as the highest authority on the HISTORY of the allotments made after April 1st, 1899 in the Creek Nation, we refer to the Sixth Annual Report of the Dawes Commission for 1899, page 9, wherein the Commission says:

"Chief Isparhecher of the Creeks was slow to call an election, and it was not until November 1, 1898, that the agreement with that tribe (Appendix No. 1, p. 31) was submitted in its

amended form for ratification. While no active interest was manifested, the full-bloods and many of the freedmen were opposed to the agreement and it failed of ratification by about one hundred and fifty votes. *As a result the Act of June 28, 1898 (Appendix No. 1, p. 31) known as the Curtis Act, became effective in that nation."*

The second agreement with the Creeks was negotiated on February 1st, 1899 (Dawes Commission's Sixth Annual Report, p. 10) which was ratified by the Creeks on February 18, 1899, but immediately thereafter rejected by Congress. All allotments made by the Commission between April 1st, 1899, the date the Creek Land Office was opened, and the approval of the Original Agreement on May 25th, 1901, were made under the Curtis Bill of 1898, section 11 thereof, and not under either of the rejected Creek Agreements. Opposing counsel say the Land Office opened about sixty days after the second rejected Creek agreement was negotiated, and that the Commission began allotting the land in anticipation of the approval of that agreement and did not proceed at any time under the Curtis Bill. We are constrained to give more credit to the *history* written by the Commission than to the belated history written by opposing counsel nearly seventeen years after the Creek Land Office was opened and we therefore refer to the Ninth Annual Report for the fiscal year ending June 30th, 1902, page 41, under the head of Allotment of Land in the Creek Nation, where the Commission says:

"The allotment of lands in the Creek Nation was commenced on April 1, 1899, a preliminary allotment of 160 acres being given alike to Creek Indians and Creek freedmen. This work was instituted under the Act of Congress of June 28, 1898, (30 Stat. L. 495), and was continued under the Creek Agreement, approved by the Act of Congress of March 1, 1901 (31 Stat. L. 861), which latter legislation confirmed allotments previously made and, in terms, authorized a continuance on the lines adopted by the Commission. Out of the total acreage of 3,172,813.16 acres there has now been allotted 2,177,262.44 acres; 550,345 acres of this amount were allotted during the fiscal year ended June 30, 1902, or practically 1,800 acres a day."

All the Territorial, State and Federal Courts having occasion to mention the matter involved, have stated that allotments made in the Creek Nation prior to the Original Creek Agreement were made under the Curtis Bill of 1898, and we submit that the contemporaneous expressions of the courts are better evidence of history than the belated statements of opposing counsel.

Thus, in *Harris v. Hartridge*, 7 Ind. Ter. 532, 104 S. W. 826, the Court of Appeals of the Indian Territory, on September 26th, 1907, held that allotments made in the Creek Nation under the Curtis Bill of June 28 1898, were non-transferable until after full title, and that Congress had authority in the Original Agreement to continue the restrictions. That same case proceeded to the Eighth Circuit

Court of Appeals where it was decided on December 2nd, 1908, 166 Fed. 109, and that court likewise held that the land was allotted under the Curtis Bill of 1898. And in that great "land mark in Oklahoma," *de Graffenried v. Iowa Land & Trust Company*, 20 Okl. 687, decided April 13th, 1908, the Oklahoma Supreme Court clearly and positively stated on page 697 and page 698 that the allotment there involved was allotted under the Curtis Bill of June 28th, 1898, and the court proceeded to copy in full section 30 of the Curtis Bill, and likewise, section 11 of the Curtis Bill, as the authority of the Commission for the allotment of the land involved in that case. The allottee in that case, however, did not die until June 7th, 1902, a considerable time after the ratification of the Curtis Bill allotments by section 6 of the Original Agreement, and consequently, the questions involved in this case were not presented in that case.

Likewise, in *Barnett v. Way*, 29 Okl. 780, decided November 14th, 1911, the court expressly held that the allotments in the Creek Nation made prior to the ratification of the Original Agreement, were made under the Curtis Bill of 1898. And in this very case at bar the Oklahoma Supreme Court (see record page 77) said in its opinion: "Agnes Hawes selected her allotment of lands in accordance with section 11 of the Act of Congress of June 28th, 1898,⁹ commonly called the Curtis Bill." And yet opposing counsel state that "it is a well known fact of history in the Creek Nation that these tentative allotments were

made in virtue of the proposed agreements which failed, and not under section 11'' of the Curtis Bill. Strange that the Dawes Commission and the local courts were never advised of this well known history.

Completion of the Rolls.

Opposing counsel next argue that the Commission had no authority to make any allotments under the Curtis Bill until after the roll of citizenship was fully completed, as provided by law. The Commission had begun the work of enrolling citizens in the Creek Nation under the Act of June 10th., 1896 (29 St. L. 339), and under section 21 of the Curtis Bill they were directed to proceed with the completion of the rolls. Said section 21 confirmed the J. W. Dunn freedmen roll of the Creeks, and directed the Commission to "enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation."

The Act of June 10th, 1896, (20 St. L. 339, Thomas' Five Civilized Tribes, p. 286) provided "That the rolls of citizenship of the several tribes as now existing are hereby confirmed, etc." Section 21 of the Curtis Bill provided that "The rolls so made, when approved by the Secretary of the Inter-

ior, shall be final," and this was intended to impart finality to the rolls, the Secretary's authority being limited to approving, not making the rolls.

If the Commission had awaited an actual completion of the roll, and its approval by the Secretary, there would have been no lands allotted in the Creek Nation until about the last of 1902 or first of 1903.

On page 46 of opposing counsel's brief, it is stated that: "It is a well known fact of Creek history that the final rolls of the tribe made and submitted by the Commission under the provision of the Original Creek Agreement were approved by the Secretary of the Interior in March, 1902, to-wit: on the 13th and 28th days of that month." No record is cited to support this statement, and we have not the time to look it up, but if that statement be true and opposing counsel's contention be sound that no allotments could be made until the final rolls were approved by the Secretary, then all allotments made by the Commission after May 25th, 1901, under the Original Agreement and before the rolls were approved by the Secretary, are void for want of authority in the Commission. Curtis Bill allotments, however, were approved by the Original Agreement. The completion and approval of the rolls as final were not conditions precedent to the Commission allotting the lands—at least preliminary allotments, that is, a minimum allotment as the first fractional part of the domain to which the citizen was entitled

to receive upon the partition of the tribal property. Section 28 of the Original Agreement provides that "no person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement." This means the rolls as made by the Commission, and not the rolls as approved by the Secretary. The Secretary's approval could follow later. Otherwise, the Secretary was required to approve on the date of the ratification of the Original Agreement, to-wit; May 25th, 1901, and certainly that was not contemplated. The Secretary approved the rolls in piece meal. The Commission would make up a list from time to time and forward to the Secretary for his approval, and in the Ninth Annual Report of the Commission for the fiscal year ending June 30th, 1902, page 39, it is said:

"During the year very satisfactory progress has been made in preparing partial rolls of citizenship for review by the Secretary of the Interior. Great care has been exercised, and much time and labor devoted to this work, it being essential to guard against duplications, the enrollment of citizens who died prior to April 1, 1899, and infants who were born between that date and July 1, 1900.

The names of 9,018 citizens by blood and 4,954 Creek freedmen, who had been duly listed for enrollment by the Commission, have been forwarded to and approved by the Secretary of the Interior."

This report was transmitted on July 20th, 1902, to the Secretary of the Interior, and an examination of pages 39, 40 and 41, will show that the rolls had not at that time been completed, although the Commission was proceeding to allot the lands from and after May 25th, 1901, under the Original Creek Agreement, section 3 thereof providing that all the lands of the tribe shall be allotted among the citizens of the tribe by the Commission so as to give to each "an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the *equalization of values*, and any allottee receiving lands of less than such standard value may, at any time, *select other lands which*, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed."

There are 3,172,813.16 acres in the Creek Nation (see Dawes Commission's Ninth Annual Report for the fiscal year ending June 30th, 1902, p. 41), and the Dawes Commission with the tribal rolls before it could well approximate the number of citizens and safely begin making *preliminary allotments* under section 11 of the Curtis Bill long before the

Secretary approved the final rolls. There is nothing in the Curtis Act requiring the Commission to await the Secretary's approval of the rolls, section 11 merely providing that when the roll of citizenship is completed the Commission shall proceed to allot "all the lands, etc." Of course no final or total allotments could be made until the rolls were completed, and the Commission did not undertake or purport to make any complete allotment under the Curtis act, that is, the Commission did not undertake to allot to each citizen his entire share of the tribal lands, but merely allotted him one hundred and sixty acres to begin with, and hence the phrase, *preliminary allotments*.

Again, section 11 of the Curtis Bill merely requires the rolls to be completed preceding the allotment of "All the lands of said nation or tribe susceptible of allotment among the citizens thereof, etc." The Commission did not undertake to allot "*all the lands*" under the Curtis Bill, and in fact the Commission estimated, in the Sixth Annual Report for the fiscal year ending June 30th, 1899, page 13, that each citizen would receive nearly two hundred acres of land, and subsequent events have thoroughly demonstrated that the Commission was safe in making preliminary allotments of one hundred and sixty acres to each citizen. After various acts of Congress, for instance, the Supplemental Creek Agreement of 1902, and the act of 1905, and special Acts of Congress adding to the rolls, there are yet

many thousands of acres of unallotted lands in the Creek Nation. The Commission did not undertake, under section 11 of the Curtis Bill, to allot "*all the lands*" before the rolls were approved by the Secretary, but the Commission undertook to make preliminary allotments of one hundred and sixty acres to each citizen, contemplating thereby a second allotment in order to equalize each citizen in his share of the tribal property, as expressly provided for in section 3 of the Original Creek Agreement. This leads us to discuss the meaning of

Preliminary Allotments.

The Commission, in referring to preliminary allotments, did not mean temporary or tentative allotments, but meant first allotments—that is, that fractional part of the tribal property first distributed to the citizen as distinguished from the whole share such citizen might be entitled to. The one hundred and sixty acres was the minimum share in value and quantity, and the Commission had the right to proceed to make preliminary allotments, that is, set apart the minimum share as the first distribution. The Commission had the right to proceed to do that without awaiting the completion and the final approval of the rolls by the Secretary.

No one contends that the allotments made by the Commission under the Original Creek Agreement after May 25th, 1901, were temporary or tentative, and yet, the Commission refers, in its Tenth Annual

Report for the fiscal year ending June 30th, 1903, page 37, to allotments made under the Original Agreement approved by the act of Congress of March 1st, 1901, as "preliminary allotments." Thus the Commission says:

"Completion of the preliminary allotment of 160 acres to each citizen of the Creek Nation, as provided by the agreement with the Creeks approved March 1, 1901, (Appendix No. 1, p. 82), depends mainly upon the establishment of a date after which no application for enrollment in that tribe may be determined. Until the preliminary allotment is finished the Commission believes it may not begin the work of *equalization* upon a basis of value by allotting the residue of land, as provided by section 9 of of the agreement above referred to.

During the fiscal year ended June 30, 1903, 3,449 allotments had been made to Creek citizens. Of this number 2,268 were selected by the allottees in person or by their accredited representatives, 329 were made to the heirs of deceased persons, and 852 were arbitrary allotments made by the Commission. The land embraced in these allotments aggregates 253,108.32 acres.

Since the opening of the Creek land office, in 1899, 2,430,370.76 acres of land have been allotted. The allotment of this area is represented by 19,320 selections, made either by the allottees, their authorized representatives, or by the Commission arbitrarily for the allottees.

It will be understood that an entire allotment is not always selected at one time; hence the seeming disproportion between the number of citizens and the number of allotment selections."

Rights of Unallotted Citizen Under the Curtis Bill.

Beginning on page 42 of opposing counsel's brief it is argued that our contention would lead the court to hold that Creek citizens dying before April 1st, 1899, were entitled to allotments. No such contention is made by us. No allotments were made in the Creek Nation preceding April 1st, 1899, and a citizen dying prior to that date before receiving an allotment left no interest to his heirs. His heirs inherited no right to select an allotment, and the Curtis Bill does not provide for an allotment to the heirs of a dead citizen.

Opposing counsel suppose a case where a citizen selected an allotment under the Curtis Bill and died before April 1st, 1899, and they inquire what about those allotments. We answer, there were none. No allotments were selected until after April 1st, 1899, and Congress and the Commission, recognizing that Curtis Bill allottees acquired an estate of inheritance in the land *actually segregated and allotted*, therefore, in order to put the heirs of citizens who died after April 1st, 1899 "*before receiving*" an allotment on an equality with Curtis Bill allottees, inserted in the Original Agreement, section 28 thereof, providing for an allotment to the heirs of citizens who died after April 1st, 1899 "*before receiving their allotment, etc.*" This is the highest evidence that Congress and the tribe recognized and realized that Curtis Bill allottees had a

descendible interest; that they had land and not blue sky; and that the heirs inherited the allotment. For this reason the Original Agreement provided for a *nunc pro tunc* distribution of the tribal property as of April 1st, 1899, in order to put all citizens and their heirs on an equality. A citizen dying prior to April 1st, 1899, ~~before selecting an allotment~~ had no descendible interest in the tribal domain, as held by this court in *Sizemore v. Brady*, 235 U. S. 441. And the trouble suggested by opposing counsel is purely imaginary—a hobgoblin. If a citizen died before April 1st, 1899, he had no allotment, because the land office was not opened until that date. Where the Curtis Bill allottee had made the selection, the heirs of such Curtis Bill allottee were bound by the selection, and if they were bound by the selection, it must be certain that they inherited an interest in the land. The selection was confirmed by section 6 of the Original Agreement, but nevertheless the selection was the inception of the right, and the subsequent confirmation by section 6 of the Original Agreement operated by relation as of the date the allotment was selected during the life time of Agnes Hawes, as expressly held by the Eighth Circuit Court of Appeals in *Thomason v. Wellman*, 206 Fed. 895.

Appraisement.

No appraisement was required by the Curtis Bill preceding allotment and that settles that point.

Rule of Property.

The rule of property plea don't amount to much. *Barnett v. Way*, 29 Okl. 780, relied on as one of the cases supporting this point, was decided December 14th, 1911, a little over three years before this case is submitted for decision by this Court, and the opinion in the case at bar was filed September 17th, 1912. The point involved has been a live issue at all times.

Divine v. Harmon, 30 Okl. 820, relied on to sustain the rule of property plea, was decided December 12th, 1911, and the petition to re-hear denied on January 23rd, 1912. It is stated in the opinion of the court that "Will S. Harmon under and by virtue of the act of June 10th, 1896 (29 St. L. 339) was allotted by the Commission to the Five Civilized Tribes the land in controversy, and with his wife, Ollie Divine, the plaintiff in error, was residing thereon at the time of his death on March 1st, 1900." The act of June 10th, 1896, made no provision for allotments, and this statement of the Oklahoma Supreme Court is a fair illustration of the unfamiliarity of that court with conditions in the Eastern part of this State, and with other decisions of the local courts, proves that "like the charms of Cleopatra, age doth not wither, nor custom stay their infinite varieties."

On November 30th, 1914, this court decided in *Skelton v. Dill*, 235 U. S. 206, that lands allotted to

the heirs of a dead Creek citizen under section 28 of the Original Creek Agreement were unrestricted by the terms of the Creek Agreements. An examination of the opinion of the Supreme Court of Oklahoma in the *Skelton-Dill* case, as well as the record and briefs of counsel, discloses that it was not contended in either the trial court or the Supreme Court that because lands were allotted to the heirs, and not technically inherited by them, such lands were free from restrictions. The *Skelton-Dill* opinion of the Oklahoma Supreme Court was filed November 18th, 1911, and not until the Oklahoma Supreme Court's opinion in *Rentie v. McCoy*, 35 Okla. 77, filed November 26th, 1912, was it ever held or contended in the Creek Nation that lands allotted to the heirs were free from restrictions, it being at all times considered by the bench and bar that lands allotted to the heirs in the first instance were subject to the same restrictions imposed on lands inherited by the heirs from a dead allottee. In contemplation of the well-settled rule of construction announced by this court in *Jones v. Meehan*, 175 U. S. 1, that Indian agreements would be construed like the Indians would understand them and not like technical lawyers might interpret them, it was generally believed that the Indians had no idea of the technical distinction between the status of heirs taking by purchase in lieu of a dead ancestor, and heirs taking by technical descent from an allottee. *Rentie v. McCoy*, *supra*, was based on the decision of this court in *Mullen v.*

United States, 224 U. S. 445, arising under the Choctaw-Chickasaw Supplemental Agreement, which required that each allottee (section 12 thereof) "at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres, etc.," thus making allotments and homesteads coeval and concurrent in time. Section 22 of the Choctaw-Chickasaw Agreement provided for an allotment to the heirs of a citizen who died prior to receiving an allotment, and there being no provision for the selection of a homestead in such cases, it of course followed that the homestead part being alienable by the heirs taking by descent under the Choctaw-Chickasaw Agreement immediately upon the death of the ancestor, there was no way of identifying what part of an allotment made to the heirs was alienable and what part was inalienable. If the allotment was made to the allottee in the first instance the homestead fraction of the allotment was segregated as a homestead at the same time the allotment was selected, and on the death of the allottee became alienable by the heirs, the surplus being inalienable. But when the allotment was made to the heirs there was no way of segregating a part as the homestead, homesteads being for the living and not the dead, and consequently, there was no method of identifying the alienable part from the inalienable part, and thus Mr. Justice HUGHES in the *Mullen* case said:

"It would be manifestly inappropriate to

imply the restriction in such cases so as to make it applicable to all the lands taken by the heirs, and there is no occasion, or authority, for creating a division of the lands so as to impose a restriction upon a part of them."

The Oklahoma Supreme Court, in *Rentie v. McCoy*, *supra*, seized on the doctrine in the *Mullen* case as a basis for holding lands allotted to heirs in the Creek Nation were unrestricted, although the segregation of a homestead forty acres under the Creek treaty had nothing to do with whether the heirs could alienate within five years or not. Two-thirds of the Creek citizens received their allotments under the Curtis Bill, which made no provision for homesteads, and they were not required to select a homestead at the time they selected the allotment, because that was impossible and thus the five-year restriction against alienation applied to the one hundred and sixty acres, irrespective of the homestead characteristics.

In *Barnes v. Stonebreaker*, 28 Okla. 75, the petition to rehear being denied January 24th, 1911, the land was allotted to the heirs under section 28 of the Original Agreement, and the point was never made that the land was unrestricted simply because allotted to the heirs, the argument in that case being that the land, to-wit: forty acres, having been designated as a homestead, was alienable under the peculiar provisions of section 7 of the Original Creek Agreement.

Likewise, in *Sanders v. Sanders*, 28 Okla. 59, the petition to rehear being denied January 24th, 1911, the land was allotted direct to the heirs, and yet no contention was made that it was unrestricted for that reason. And, although the Oklahoma Supreme Court, in *Hancock v. Mutual Trust Company*, 24 Okla. 391, decided July 13th, 1909, held that lands allotted to heirs in the Choctaw and Chickasaw Nations were not restricted, giving practically the same reasons this court gave in the *Mullen* case, yet, the Oklahoma Supreme Court did not discover until November, 1912, that lands allotted to heirs in the Creek Nation were unrestricted, although the court had denied petitions to rehear in the *Stonebreaker* case and the *Sanders* case, on January 24th, 1911.

Likewise, in *Shulthis v. McDougal*, 162 Fed. 331, the Federal Circuit Court for the Eastern District of Oklahoma held that section 22 of the Act of Congress of April 26th, 1906, *removed* the restrictions from lands allotted to heirs in the Creek Nation, and that holding was affirmed by the Eighth Circuit Court of Appeals in 170 Fed. 529. The question in that case was whether or not the Act of April 26th, 1906, *removed* the restrictions. And, likewise, in *United States v. Jacobs*, 195 Fed. 707, the Eighth Circuit Court of Appeals on March 18th, 1912, held that the Act of Congress of April 21, 1904, *removed* the restrictions from lands allotted to the heirs of deceased freedmen.

In 1901, '02 and '03, land speculators in the Indian Territory obtained deeds from allottees and heirs to whom lands were allotted in the first instance for considerations varying from Ten to Fifty Dollars, not with any idea of obtaining the title, but for the purpose of obtaining possession and to use a vulgar expression then common, "bawl up the title" and eventually force the Indian to make them a deed when restrictions were removed. Relying upon the removal of restrictions by subsequent Acts of Congress *bona fide* settlers and purchasers after the Act of April 21st, 1904 (*U. S. v. Jacobs*, 195 Fed. 707), the Act of April 26th, 1906, and the Act of May 27, 1908, purchased these lands, and paid valuable considerations therefor, and likewise, many *bona fide* purchasers obtained deeds from heirs to whom lands had been directly allotted, having such deed approved by the Secretary of the Interior or the court (Sec. 9, Act May 27, 1908, 35 Stat. L. 312), it being held consistently and uniformly by the Interior Department that heirs receiving an allotment in lieu of their ancestor were in exactly the same class as heirs inheriting an allotment technically speaking. This long standing rule of property running over a period of eleven years was first challenged in the Creek Nation on November 26th, 1912, in the decision in *Rentie v. McCoy*, and finally culminated in the opinion of this court in *Skelton v. Dill* on November 30th, 1914. It would appear, therefore, that there is not much efficacy in the so-called rule of property. But in this

case at bar the time has not been long enough to ripen into a rule of property, the first decision holding the Arkansas law does not apply to Curtis Bill allotments being rendered on November 14th, 1911, a little more than three years ago.

We, therefore, respectfully submit that the case should be reversed.

WILLIAM R. LAWRENCE,

F. W. CLEMENTS,

GEO. S. RAMSEY,

Counsel for Plaintiffs in Error.

WOODWARD *v.* DE GRAFFENRIED.ERROR TO THE SUPREME COURT OF THE STATE OF
OKLAHOMA.

No. 164. Submitted February 25, 1915.—Decided June 14, 1915.

In an action to determine by what law the beneficiaries of a Creek allotment are to be determined where the allotment was selected by a Creek citizen and made by the Dawes Commission under § 11 of the Curtis Act of June 28, 1898, followed first by the death of the allottee after receiving the allotment and prior to the Original Creek Agreement and then by action of the Commission, after ratification of that agreement, awarding the land to the heirs of the deceased allottee, and the ultimate issue of a patent to them, *held* after reviewing the history of the legislation of Congress in regard to distribution of Creek lands, that:

The only lawful authority possessed by the Dawes Commission to allot Creek lands prior to the adoption of the Original Creek Agreement was derived from the Curtis Act.

Under § 11 of the Curtis Act, allottees took no assignable or inheritable interest in the land or anything more than an exclusive right to possess and enjoy the surface of the land during the lifetime of the occupant.

Decisions of the state court regarding descent of property, the earliest of which was made within three years and after the present action was commenced, cannot be regarded as a rule of property; but, while giving those decisions full weight, this court must examine the questions involved upon their merits.

The rule that reports of the committee having the matter specially in charge, so far as they antedate the statute, may be resorted to as aid to interpretation, applies especially in construing the Curtis Act, to the reports of the Dawes Commission as that Commission was in a real sense "the eyes and the ears" of Congress pertaining to Indian Territory and the legislation was framed with special regard to its recommendations.

Under the Original Creek Agreement, allotments made prior thereto under the Curtis Act, if not inconsistent therewith, were to be treated as if made after the ratification thereof including designation of beneficiaries in case of the death of the allottee.

Under the Original Creek Agreement the allotments of those who had selected lots and received allotments under the Curtis Act

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Opinion of the Court.

and had died before the ratification of the agreement descended according to the Creek Laws and not according to the laws of Arkansas.

The equitable title to an allotment made under the Curtis Act to a Creek female citizen who died before the ratification of the Original Creek Agreement vested in her heirs under § 28 of the Agreement; and, if not within excepted classes, was confirmed by § 6 of the agreement to her heirs to be determined by the Creek laws of descent.

Under the laws of the Creek Indians the husband whether citizen or not took a half interest in his wife's property if she died without children.

The restrictions upon alienation contained in the Original Creek Agreement did not apply to allotments made on behalf of deceased members of the tribe. *Skelton v. Dill*, 233 U. S. 206.

A partition suit which is dismissed because the plaintiff could not maintain it against defendants who held adversely, without first establishing title in an action in equity is not *res judicata* that the plaintiff has no interest in the property and a bar to an action in ejectment by plaintiff against the same defendants.

36 Oklahoma, 81, affirmed.

THE facts, which involve the construction and application of the Curtis Act and the Original Creek Agreement and the disposition of an allotment made by the Dawes Commission to the heirs of a Creek Indian after the death of the allottee, are stated in the opinion.

Mr. William R. Lawrence, Mr. F. W. Clements and Mr. Geo. S. Ramsey for plaintiffs in error.

Mr. Joseph C. Stone, Mr. Thomas H. Owen and Mr. Charles A. Cook for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an ejectment suit, brought by defendant in error in the District Court of Muskogee County, Oklahoma, to recover an undivided half interest in a tract of 160 acres of land situate in that county, formerly part of the domain of the Creek Nation in the Indian Territory. The tract was allotted to Agnes Hawes, a Creek Freed-

woman, who, after receiving the allotment, died without issue, leaving surviving her husband, Ratus Hawes (under whom defendant in error claims), her mother, Peggie Woodward, one of the plaintiffs in error, and her father, Louis Woodward, since deceased, to whose rights the remaining plaintiffs in error have succeeded. From an agreed statement of facts it appears that Agnes Hawes was a recognized citizen of the Creek Nation, she being a negress of full blood and enrolled on the Freedmen Roll of that Nation; that she died June 29, 1900, having previously made selection of the tract in question as her allotment of land in that Nation before the Commission to the Five Civilized Tribes and received from the Commission a certificate of allotment therefor; that after her death, and after the adoption of the Original Creek Agreement (Act of March 1, 1901, c. 676, 31 Stat. 861; effective May 25, 1901, 32 Stat. 1971), the Commission awarded the same land to her heirs, and thereafter, on April 1, 1904, a patent for it was duly issued to the "Heirs of Agnes Hawes," without naming them, which patent was in due form and approved by the Secretary of the Interior; that the patent, having been properly recorded, was accepted by her heirs; that at her death Agnes was the legal and acknowledged wife of Ratus Hawes, a non-citizen; that she left no children or grandchildren surviving her, had no children by her said husband, and was survived by him and by her parents already mentioned; and that on June 22, 1904, Ratus Hawes conveyed to plaintiff (defendant in error) an undivided half interest in the lands in question, by deed duly acknowledged and recorded in the records at Muskogee.

There was a judgment for the plaintiff, which was affirmed by the Supreme Court of Oklahoma (36 Oklahoma, 81), and the present writ of error was allowed.

A brief additional recital should preface a statement of the questions in controversy. The date of the selection

by Agnes Hawes and of the allotment to her of the tract in question is not mentioned in the record; but it must have been on or after April 1, 1899, that being the date on which the allotment office for the Creek Nation was opened at Muskogee by the Commission to the Five Civilized Tribes, as appears from their Sixth Annual Report, p. 18, referred to in the marginal note, *infra*. Therefore, both the allotment and the death of the allottee occurred within the period during which § 11 of the Curtis Act (Act of June 28, 1898, c. 517, 30 Stat. 495, 497), was in force in the Creek Nation, by the terms of which the Commission was directed, upon the completion of the citizenship roll and the survey of the lands of the tribe, to "proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same," with reservations that need not at the moment be specified.

From the facts stated it is also evident that the allotment to Agnes Hawes was made under and by virtue of this section, and therefore comes within the category of allotments confirmed by the Original Creek Agreement (Act of March 1, 1901, c. 676, § 6, 31 Stat. 861, 863).

For we lay on one side, as quite untenable, the contention of defendant in error that the allotment was made not under the Curtis Act but under the Creek Agreement of February 1, 1899, which failed to become law. The principal ground of the contention is that conditions precedent to allotment, prescribed in terms or necessarily implied from § 11 of the Curtis Act, had not been performed in the Creek Nation: the rolls of citizenship not having been completed, no appraisalment or classification of the lands having been made for determining what lands were susceptible of allotment and for equalizing the value of allot-

ments, no selections having been approved by the Secretary of the Interior, etc. Not to mention other answers that might be made to this, it is sufficient for the present to say that the only lawful authority to allot Creek lands possessed by the Commission prior to the adoption of the Original Creek Agreement, was derived from the Curtis Act, and that all allotments made during the intervening period were made under instructions issued by the Secretary of the Interior with express reference to the latter act. This will be more particularly shown when we come to discuss, as we must, the proper construction of the two Acts referred to, and their effect upon the title to the allotted tract. The fact that conditions precedent imposed by the Curtis Act had not been performed when the Commission proceeded to make Creek allotments after its passage and prior to the Original Creek Agreement may have furnished one of the reasons for the express ratification of such allotments contained in § 6 of the Agreement; but this, of course, is far from saying that the allotments were not made under the Curtis Act.

The case presented, therefore, is that of a Creek allotment selected by the citizen and made by the Dawes Commission under § 11 of that Act, followed first by the death of the allottee after receiving the allotment and prior to the Original Creek Agreement, and then by action of the Commission, after ratification of that Agreement, awarding the lands to the "heirs" of the deceased allottee, and the ultimate issue of a patent to them.

The principal question is: By what law are the beneficiaries of the allotment and patent to be determined? Plaintiffs in error contend that, by the terms of § 11 of the Curtis Act, Agnes Hawes took an estate of inheritance, subject to the reservation of the minerals; that at her death this interest descended to her heirs, according to the Arkansas laws of descent, under which the husband was not an heir, and acquired no interest in the land by the

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curtesy, there being no child born of the marriage; and that § 6 of the Original Creek Agreement in ratifying the allotment vested an absolute title in her heirs, which related back to the date of the allotment or else to the date of her death, and carried the minerals with it. It is the contention of defendant in error, sustained by the Oklahoma courts, that the allotment to Agnes Hawes under the Curtis Act did not vest in her the fee or any heritable interest; that the (equitable) fee was first vested in her "heirs" by the provisions of the Original Creek Agreement, they taking by purchase and not by descent; and that who should take as her "heirs" must be determined according to the Creek laws of descent, under which the surviving husband took an undivided half interest, which passed by his deed to defendant in error.

It is not open to question that at the death of Agnes Hawes (June 29, 1900) the Arkansas law of descent was in force in the Creek Nation. This court, in a recent decision, pointed out the successive acts of legislation, culminating in §§ 26 and 28 of the Curtis Act itself, by which Congress had displaced the tribal laws of descent and distribution and substituted the Arkansas law as expressed in Chapter 49 of Mansfield's Digest. *Washington v. Miller*, 235 U. S. 422, 424. But, as shown in that case (p. 425), the Original Creek Agreement contained provisions which reinstated the Creek laws of descent and distribution for certain purposes affecting the allotments in that Nation. Whether they apply to the present case is a subordinate question, to be discussed in its order.

In order to determine the questions thus presented it is necessary first to ascertain the true meaning of § 11 of the Curtis Act, and then to consider the pertinent provisions of the Original Creek Agreement.

In *Barnett v. Way* (1911), 29 Oklahoma, 780, a case precisely in point with the present—the allotment having been made under § 11 of the Curtis Act and the allottee

having died thereafter and before the ratification of the Original Creek Agreement—the Supreme Court of Oklahoma held the rule of descent and distribution obtaining at the death of the allottee to be immaterial because she had no title in fee, legal or equitable, that could descend; and further held that by § 6 of the Original Agreement her allotment was ratified, and by § 28 was vested in her heirs, to be ascertained as of the date of her death according to the rule of descent and distribution then in force in the Creek Nation governing the devolution of property owned by any of its deceased members at the time of the member's death. To the same effect is *Divine v. Harmon*, 30 Oklahoma, 820. These decisions are invoked by defendant in error as establishing a rule of property. But, as the first of them was rendered only a little more than three years ago, after the present action was commenced and less than a year before it was decided by the Supreme Court of Oklahoma, it seems proper that, while giving due weight to the state decisions, we should reexamine the questions upon their merits.

Upon a first attentive reading of the Curtis Act (c. 517, 30 Stat. 495) it is seen to be divisible into three principal parts: (a) the first 28 sections, which contain obligatory provisions applicable (with minor exceptions not important in this discussion) generally throughout the Indian Territory, which at that time (Act of May 2, 1890, c. 182, § 29, 26 Stat. 81, 93) included the country of the Five Civilized Tribes, and little besides; (b) § 29, which ratified an agreement made by the Dawes Commission with commissions representing the Choctaw and Chickasaw tribes on April 23, 1897 (the "Atoka Agreement"), as amended, the same to be of full force and effect if ratified before December 1, 1898, by a majority of the votes cast by the members of the tribes at an election held for that purpose; "and if said agreement as amended be so ratified, the provisions of this Act shall

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then only apply to said tribes where the same do not conflict with the provisions of said agreement," and (c) § 30, ratifying and resubmitting, on similar terms and with like effect, an agreement made by the Dawes Commission with a commission representing the Creek tribe on September 27, 1897, as amended.

The first part of the Act required (§ 11) the allotment, *without the consent of the tribe*, of "the exclusive use and occupancy of the surface" of all tribal lands susceptible of allotment, reserving to the tribe all oil, coal, asphalt, and mineral deposits, and all town sites; the oil and other minerals to be leased (§ 13) by the Secretary of the Interior; the town lots to be sold (§ 15), with right of preemption to the owner of the substantial improvements, if any, and the purchase money to become the property of the tribe *upon the execution and delivery to the purchaser, by some person authorized by the tribe, of a deed conveying to him the title to the lands*. Each of the proposed agreements contains provisions for the allotment of lands to the members of the tribes, to be followed by the delivery of a *patent conveying all the right, title and interest of the tribe*, excepting, in the case of the Atoka Agreement, the coal and asphalt under the land. With respect to allotments to be made under § 11, *no provision is made for extinguishing the tribal title*. But there is a proviso (p. 498): "That the lands allotted shall be nontransferable until after full title is acquired, and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held." By § 12, the allotments were to be reported to the Secretary of the Interior, "and *when he shall confirm such allotments* the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this Act."

Considering the language of § 11, and the absence of provision for extinguishing the tribal title to allotted lands, in contrast with the provisions respecting title

contained in § 15 as to town lots, and those contained in each of the proposed agreements as to both allotments and town lots, it seems sufficiently plain, upon the face of the Act, that allottees under § 11 were to take only "the exclusive use and occupancy of the surface," with the right to remain in peaceable and undisturbed possession, but without right to transfer the allotment until full title should be acquired. For the acquisition of such title, no provision was made by this Act, except as either or both of the proposed Agreements might be ratified by the tribes concerned. There was, however, in § 15 of an Act of March 3, 1893, c. 209, 27 Stat. 612, 645, a grant of authority to each of the tribes to allot their lands in severalty, not exceeding 160 acres to any one person.

Having regard, therefore, merely to the language employed in § 11 of the Curtis Act and the context, there is no foundation for the contention that allottees thereunder took any assignable or inheritable interest in the land, or anything more than an exclusive right to possess and enjoy the surface of the land during the lifetime of the occupant.

It is, however, insisted by plaintiffs in error that when the conditions existing at the time of the passage of this Act, and the objects Congress sought to attain by it, are fully understood and considered, § 11 bears a different import, and by its true construction confers upon the allottee at least an equitable title of inheritance in the lands set apart to him, saving the minerals. It is said that to confer upon the allottee a mere right of occupancy for life, to revert to the tribe and become a part of the public domain upon his decease, would have given to the Creek Indians less than they already had under their own laws, which conferred the right to inclose and cultivate lands of the tribe and to pass the improvements to their heirs at their death. It is insisted that at least the Curtis Act allottee took an inheritable right of occupancy,

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and that this, coupled with the confirmation arising from § 6 of the Original Agreement, vested the fee in the heirs of the allottee as of the time of his or her decease, even though that event occurred before the ratification of the Agreement.

It is very true that this Act, passed as it was during a period of transition in the history of the Indian Territory, must be interpreted in the light of the situation then existing, and that we should have especial regard to the "old law" and the "mischief" in order to correctly appreciate the "remedy." And, in view of the great importance of the question before us—for it appears that much the greater part of the Creek lands were allotted during the period intervening between April 1, 1899, and May 25, 1901,—we have resorted to all authentic sources of information within reach in order to realize and appreciate the situation that presented itself to Congress when the Curtis Act was passed. The result is that the view above expressed respecting the true intent and meaning of § 11 is most fully confirmed.

The history of the removal of the Muskogee or Creek Nation from their original homes to lands purchased and set apart for them by the Government of the United States in the territory west of the Mississippi River, does not differ greatly from that of the others of the Five Civilized Tribes rehearsed in recent decisions of this court. *Mullen v. United States*, 224 U. S. 448; *Goat v. United States*, 224 U. S. 458, 461. Pursuant to treaty provisions (Treaty of 1826, Art. 6, 7 Stat. 286; Treaty of 1832, Arts. 12 and 14, 7 Stat. 366; Treaty of 1833, Art. 3, 7 Stat. 417), the Creeks held their lands under letters patent issued by the President of the United States dated August 11, 1852, vesting title in them as a tribe, to continue so long as they should exist as a nation and continue to occupy the country thereby assigned to them. McKellop's Comp. 1893, p. 9. These treaties and the

Treaty of 1856, 11 Stat. 699, Articles 4 and 15, conferred in ample terms the right of self-government so far as compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indian tribes. The other four tribes held similar patents.

In the course of time, changing conditions and the great influx of white people into the Territory pointed to the necessity of abolishing, if possible, the tribal organizations, and allotting the land in severalty. But because of the special rights that had been conferred upon these tribes, and the fact that they held patents for their respective lands, it was considered proper, if not indispensable, to obtain the consent of the Indians to the overthrow of the communal system of land ownership. As early as the year 1866, shortly after the close of the Civil War, when new treaties were negotiated with the Five Civilized Tribes (14 Stat. 755, 769, 785, 799), the treaty with the Choctaws and Chickasaws (pp. 774-778) contained provisions for a survey, division, and allotment of their lands, so as to change the tenure from a holding in common to a holding in severalty, in tracts of a quarter-section each; but this plan was made contingent upon the consent of the Choctaw and Chickasaw people through their respective legislative councils. The Chickasaw Council, by an act approved November 9, 1866 (reëacted October 17, 1876), not only confirmed the treaty but gave assent to the adoption of the proposed plan of allotment. The Choctaw Council, by an act approved December 21, 1866, referred the proposition "to the people at large to be declared through their legal representatives in council at the October session, A. D. 1867;" but no affirmative action appears to have been taken upon it. And so the provisions of the treaty in this respect were not put into effect.

When Congress in the act of February 8, 1887, ch. 119,

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24 Stat. 388, entered upon the general policy of allotting lands in severalty to the Indians upon the various reservations, the lands of the Creeks and other Indians in the Indian Territory were by § 8 excluded from the operation of the Act.

By § 15 of the Indian Appropriation Act of March 3, 1893, c. 209, 27 Stat. 612, 645, Congress sought to encourage the Five Civilized Tribes to themselves enter upon the policy of allotting their lands in severalty, by giving the express consent of the United States to such allotments, not exceeding 160 acres to any one individual, declaring that the allottees should be deemed to be citizens of the United States and that the reversionary interest of the United States in the allotted lands should cease, and appropriating money to pay for the survey of any lands so allotted. As a declaration of the policy of the United States this section has importance. But it seems to have had no direct effect in the way of establishing that policy; at least, we have found nothing to show that any of the tribes allotted any of their land pursuant to it.

By § 16 of the same Act provision was made for the appointment of a commission to enter into negotiations with the same tribes for the purpose of extinguishing the tribal titles, either by cession to the United States or by allotment and division in severalty among the Indians, or by such other method as might be agreed upon between the several tribes and the United States, with a view to the ultimate creation of a State or States of the Union to embrace the lands within the Territory. This was the origin of the Commission to the Five Civilized Tribes, familiarly known as the Dawes Commission. Its reports, issued annually thereafter, and communicated by the Secretary of the Interior to Congress for its information and guidance, gave a complete and interesting history of the efforts made to further the policy of Congress—efforts

beginning in discouragement but finally crowned with success. So far as these reports antedate the legislation that is under inquiry, they may of course be resorted to as aids to interpretation, for the Commission was in a very real sense "the eyes and the ears" of Congress in matters pertaining to affairs in the Indian Territory, and legislation was framed with a special regard to its recommendations. (See *Holy Trinity Church v. United States*, 143 U. S. 457, 465; *Binns v. United States*, 194 U. S. 486, 495.) We append, in the margin a reference-list of these reports.¹

The 1st Report contains a general explanation of conditions in the Territory, indicating (p. lxviii) the complete

¹ REFERENCE LIST OF ANNUAL REPORTS OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES, transmitted to Congress in connection with the reports of the Secretary of the Interior, and printed as House Documents.

- 1st Report, Nov. 20, 1894, House Ex. Doc., Part 5, 53d Cong., 3d Sess., Vol. 14, pp. lix-lxx.
- 2d Report, Nov. 14, 1895, House Doc. No. 5, 54th Cong., 1st Sess., Vol. 14, pp. lxxix-xcvii.
- 3d Report, Nov. 28, 1896, House Doc. No. 5, 54th Cong., 2d Sess., Vol. 12, pp. cl-clv.
- 4th Report, Oct. 11, 1897, House Doc. No. 5, 55th Cong., 2d Sess., Vol. 12, pp. cxvii-cxl.
- 5th Report, Oct. 3, 1898, House Doc. No. 5, 55th Cong., 3d Sess., Vol. 15, pp. 1051-1090.
- 6th Report, Sept. 1, 1899, House Doc. No. 5, 56th Cong., 1st Sess., Vol. 19, pp. 3-178.
- 7th Report, Sept. 1, 1900, House Doc. No. 5, 56th Cong., 2d Sess., Vol. 28, pp. 5-79.
- 8th Report, Oct. 1, 1901, House Doc. No. 5, 57th Cong., 1st Sess., Vol. 24, pp. 5-221.
- 9th Report, July 20, 1902, House Doc. No. 5, 57th Cong., 2d Sess., Vol. 18, pp. 180-217.
- 10th Report, Sept. 30, 1903, House Doc. No. 5, 58th Cong., 2d Sess., Vol. 20, pp. 1-190.
- 11th Report, Oct. 15, 1904, House Doc. No. 5, 58th Cong., 3d Sess., Vol. 20, pp. 1-198.
- 12th Report, June 30, 1905, House Doc. No. 5, 59th Cong., 1st Sess., Vol. 19, pp. 579-640.

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failure of the tribal governments, and showing that the principle of the treaties, which was that the lands of the several nations should be held in common for the equal benefit of the citizens, was so far departed from in practice that a few energetic men had been enabled to appropriate to their exclusive use almost the entire property of the Territory that could be rendered profitable and available. "In one of these tribes, whose whole territory consists of but 3,040,000 acres of land, within the last few years laws have been enacted under the operation of which 61 citizens have appropriated to themselves and are now holding for pasturage and cultivation 1,237,000 acres. This comprises the arable and greater part of the valuable grazing lands belonging to that tribe. . . . In another of these tribes, under similar legislation, vast and rich deposits of coal of incalculable value have been appropriated by the few, to the exclusion of the rest of the tribe and to the great profit of those who operate them and appropriate their products to their individual use." It was further pointed out that towns of considerable importance, with permanent improvements of great value, had been built upon lands which could not be granted in severalty to the inhabitants. In the 2d Report, pp. lxxxvii, xciii, the substance of the above statements was reiterated with emphasis. And in the 4th Report, dated October 11, 1897, and submitted to Congress shortly before the consideration of the Curtis Bill, reference was made to the pending agreements with the Choctaws and Chickasaws, and with the Creeks (these were rejected by the Indians before the Curtis Bill was passed), and attention was again called (p. cxxi) to "the condition to which these Five Tribes have been brought by their wide departure in the administration of the governments which the United States committed to their own hands, and in the uses to which they have put the vast tribal wealth with which they were intrusted for the common enjoyment of all their peo-

ple. . . . Longer service among them and greater familiarity with their condition have left nothing to modify either of fact or conclusion in former reports, but on the contrary have strengthened convictions that there can be no cure of the evils engendered by the perversion of these great trusts but their resumption by the Government which created them." From these reports it also appears that while there was a strong sentiment among the Indian natives favorable to the subdivision of the tribal lands into individual holdings, the principal chiefs and most influential citizens were at first opposed to any concession threatening the permanence of the communal or tribal titles.

The first agreement negotiated with the Creeks was dated September 27, 1897, and in unamended form is found in the 4th Report, p. cxxix. It provided that every Creek citizen should have an allotment of 160 acres of the tribal lands, for which he should receive a patent conveying to him the tribal title; that land should be set apart for religious and educational institutions, for public buildings, and for cemetery purposes; that the town lots should be appraised—land and improvements separately—and that the owners of the improvements might buy the land; and that the balance of the tribal lands should be appraised and sold at auction, and the proceeds put into the Treasury of the United States and used for the purpose of equalizing the allotments with respect to value. The Commission say in their 5th Report, dated October 3, 1898 (p. 1052), that this agreement "was rejected by the [Creek] council, the Chief, Isparhecher, some of his friends and other persons interested in leases obtained from the nation, opposing the changes contemplated in it." This rejection was prior to the passage of the Curtis Act.

Even before the first report of the Commission, the attention of the Senate of the United States was especially drawn to affairs in the Indian Territory, and a select committee was sent there to make an investigation. They

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reported under date May 7, 1894, expressing views closely agreeing with those afterwards expressed by the Dawes Commission. And the House Committee report that accompanied the Curtis Bill was to the same effect in substance.

We have set forth in the margin extracts from (a) the Senate Committee report just mentioned, (b) the House Committee report, and (c) the Bill as enacted into law, the latter selected to show how its provisions were directed to the mischiefs pointed out in the reports. The italics are ours.¹

¹ EXTRACTS FROM SENATE COMMITTEE REPORT NO. 377, May 7, 1894, 53d CONG., 2d SESS., VOL. 5.

"The theory of the Government was when it made title to the lands in the Indian Territory to the Indian tribes as bodies politic that the title was held for all of the Indians of such tribe. *All were to be the equal participators in the benefits to be derived from such holding. But we find in practice such is not the case.* A few enterprising citizens of the tribe, frequently not Indians by blood but by intermarriage, have in fact become the practical owners of the best and greatest part of these lands, while the title still remains in the tribe—theoretically for all, yet in fact the great body of the tribe derives no more benefit from their title than the neighbors in Kansas, Arkansas, or Missouri. According to Indian law (doubtless the work of the most of the enterprising class we have named) an Indian citizen may appropriate any of the unoccupied public domain that he chooses to cultivate. In practice he does not cultivate it, but secures a white man to do so, who takes the land on lease of the Indian for one or more years according to the provision of the law of the tribe where taken. The white man breaks the ground, fences it, builds on it, and occupies it as the tenant of the Indian and pays rental either in part of the crop or in cash, as he may agree with his landlord. Instances came to our notice of Indians who had as high as 100 tenants, and we heard of one case where it was said the Indian citizen, a citizen by marriage, had 400 holdings, amounting to about 20,000 acres of farm land. We believe that may be an exceptional case, but *that individual Indians have large numbers of tenants on land not subdued and put into cultivation by the Indian, but by his white tenant, and that these holdings are not for the benefit of the whole people but of the few enterprising ones, is admitted by all.* The

The Curtis bill, as introduced in the House, did not contain the provisions of the present §§ 29 and 30 (30 Stat. 505, 514), ratifying, with amendments, and sub-

monopoly is so great that in the most wealthy and progressive tribe your Committee were told that 100 persons had appropriated fully one-half of the best land. This class of citizens take the very best agricultural lands and leave the poorer land to the less enterprising citizens, who in many instances farm only a few acres in the districts farthest removed from the railroads and the civilized centers. As we have said, *the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians*, and the question arises what is the duty of the Government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the Government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights. . . . We do not care to at this time suggest what, in our judgment, will be the proper step for Congress to take on this matter, for the commission created by an act of Congress, and commonly known as the Dawes Commission, is now in the Indian Territory with the purpose of submitting to the several tribes of that Territory some proposition for the change in the present very unsatisfactory condition of that country. We prefer to wait and see whether this difficult and delicate subject may not be disposed of by an agreement with the several tribes of that Territory. But if the Indians decline to treat with that Commission and decline to consider any change in the present condition of their titles and government the United States must, without their aid and without waiting for their approval, settle this question of the character and condition of their land tenures and establish a government over whites and Indians of that Territory in accordance with the principles of our constitution and laws."

EXTRACTS FROM HOUSE COMMITTEE REPORT, March 1, 1898, accompanying the Curtis Bill, (House Rep. No. 593, 55th Cong., 2d Sess., Vol. 3).

"The Committee on Indian Affairs, to whom was referred the bill (H. R. 8581) for the protection of the citizens of the Indian Territory and for other purposes, respectfully report:

"On account of the importance of the questions involved and the many interests affected by the measure, the question was submitted to a sub-committee of five, who invited a subcommittee of three from

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mitting to the approval of the members of the respective tribes, the Atoka agreement and the Creek agreement of September 27, 1897, then recently rejected by the Indians.

the Committee on Indian Affairs in the Senate to join them. The subject was considered by that joint committee for several days and then by the full Committee on Indian Affairs in the House, and after the most careful investigation, your committee recommended the passage of the bill.

"Your committee believes that it has, by this bill, provided a way by which many of the evils existing in the Indian Territory may be corrected.

* * * * *

"It appears that the title to lands in the Indian Territory has been conveyed by patent to the tribes, and can not be taken from them without their consent. There are about 20,000,000 acres of land thus owned. It is rich in mineral deposits, and contains a large area of splendid farming and grazing land. . . .

"For the last few years the Dawes Commission has been endeavoring to secure agreements with the various tribes, but so far there has been little accomplished. Agreements were made with the commissioners of the several tribes—all, in fact, except the Cherokees—but the Creek agreement was rejected by the tribe when the vote was taken upon it. . . . In view of the fact that it is now impossible to secure agreements with the tribes, and the fact that the title is in the tribe, your committee has provided for the allotment of the exclusive use and occupancy of the surface of the lands of each of the nations; but all valuable oil, coal, asphalt, mineral deposits, and town sites are reserved from allotments.

"Your committee found that while under treaty provisions the lands of each tribe were to be held for the use and benefit of each of its members, yet the truth is that the lands are in the possession of a very few; and while some of the more powerful members have in their possession and under their control thousands of acres, the poorer class of Indians are unable to secure enough lands for houses and farms; and your committee has provided in this bill for a division of the use of the surface of the lands, so that each and every member of the tribes will be placed in possession of his share of the common lands. We believe this to have been the intent of all parties when the treaty was made.

"Your committee was convinced that there are many rich deposits of coal and other minerals in said Territory, and that the tribes are not deriving the benefits therefrom that they should derive, but that individual members, and those holding leases from them, are deriving

These were added as a Senate amendment, perhaps at the suggestion of the Dawes Commission, for it appears from their 5th Report, p. 1053, that they were in Washington

more than their share of the profit, so it has provided that all valuable mineral deposits be reserved to the tribes and be set aside as incapable of allotment, and that such mineral deposits be in the future leased under rules and regulations prescribed by the Secretary of the Interior. . . .

"Your committee fully appreciates the important problems involved, and it believes this measure, if enacted into law, will do much to settle those problems. *It will settle the intruder question, protect the so-called common Indians by allotting to them their right to use and occupy their part of the lands; it will break up the monopoly of lands which has reached enormous proportions in the Territory; it will secure to the tribes the income from the rich mineral deposits, and prevent that which rightfully belongs to them from being used by a few individuals; it will assist in establishing schools and churches; it authorizes the laying out of cities and towns, and gives them power to enact and enforce ordinances; it will insure the people of that country the protection and relief to which they are entitled, and, at the same time, it protects the interests of the various tribes.*"

EXTRACTS FROM CURTIS ACT (c. 517, 30 Stat. 495).

"SEC. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under Acts of Congress, and known as the 'Dawes Commission,' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same; but all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits; . . . When such allotment of the lands of any tribe has been by them completed, said commission shall make full report thereof to the Secretary of the Interior for his approval; . . . *provided further, that whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home, if the holder so desires. . . . Provided further, that the lands allotted shall*

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coöperating with Congress respecting this legislation. Section 11, however, in substantially its final form, was a part of the original bill. Sections 16, 17, and 23, also, but in somewhat different form, were in the bill as introduced.

be nontransferable until after full title is acquired and shall be liable for no obligations contracted prior thereto by the allottee, and shall be non-taxable while so held.

"SEC. 12. That when report of allotments of lands of any tribe shall be made to the Secretary of the Interior, as hereinbefore provided, he shall make a record thereof, and when he shall confirm such allotments the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this Act.

"SEC. 13. That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void. . . .

"SEC. 15. That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek, and Cherokee tribes. . . . Said commissions shall cause to be surveyed and laid out town sites where towns with a present population of two hundred or more are located, . . . And all town lots shall be appraised by said commission at their true value, excluding improvements; and separate appraisements shall be made of all improvements thereon; and no such appraisement shall be effective until approved by the Secretary of the Interior. . . . The owner of the improvements upon any town lot, other than fencing, tillage, or temporary buildings, may deposit in the United States Treasury, Saint Louis, Missouri, one-half of such appraised value; . . . and such deposit shall be deemed a tender to the tribe of the purchase money for such lot. If the owner of such improvements on any lot fails to make deposit of the purchase money as aforesaid, then such lot may be sold in the manner herein provided for the sale of unimproved lots; . . . All town lots not improved as aforesaid shall belong to the tribe, and shall be in like manner appraised, and, after approval by the Secretary of the Interior, and due notice, sold to the highest bidder at public auction by said commission, but not for less than their appraised value, unless ordered by the Secretary of the Interior; and purchasers may in like manner make deposits of the purchase money with like effect, as in case of improved lots. . . . The person authorized by the tribe or tribes may execute or deliver to any such

It is evident that at the time this law was enacted, Congress entertained serious doubts as to its constitutional power to interfere with the tribal lands of the Five Civ-

purchaser, without expense to him, a deed conveying to him the title to such lands or town lots; and thereafter the purchase money shall become the property of the tribe; and all such moneys shall, when titles to all the lots in the towns belonging to any tribe have been thus perfected, be paid per capita to the members of the tribe. . . .

"SEC. 16. That it shall be *unlawful for any person, after the passage of this Act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for anyone to pay to any individual any such royalty or rents or any consideration therefor whatsoever; . . . Provided, That where any citizen shall be in possession of only such amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe and that to which his wife and minor children are entitled, he may continue to use the same or receive the rents thereon until allotment has been made to him. . . .*

"SEC. 17. *That it shall be unlawful for any citizen of any one of said tribes to inclose or in any manner, by himself or through another, directly or indirectly, to hold possession of any greater amount of lands or other property belonging to any such nation or tribe than that which would be his approximate share of the lands belonging to such nation or tribe and that of his wife and his minor children as per allotment herein provided; and any person found in such possession of lands or other property in excess of his share and that of his family, as aforesaid, or having the same in any manner inclosed, at the expiration of nine months after the passage of this Act, shall be deemed guilty of a misdemeanor. . . .*

"SEC. 23. *That all leases of agricultural or grazing land belonging to any tribe made after the first day of January, eighteen hundred and ninety-eight, by the tribe or any member thereof shall be absolutely void, and all such grazing leases made prior to said date shall terminate on the first day of April, eighteen hundred and ninety-nine, and all such agricultural leases shall terminate on January first, nineteen hundred; but this shall not prevent individuals from leasing their allotments when made to them as provided in this Act, nor from occupying or renting their proportionate shares of the tribal lands until the allotments herein provided for are made."*

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ilized Tribes or to overthrow the tribal governments without the consent of the Indians. Some of the doubts were afterwards resolved by the decisions rendered by this court in *Stephens v. Cherokee Nation*, 174 U. S. 445, 489, 491, and *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307. From what has been said and quoted, however, it very clearly appears that the purpose of Congress in the allotment provisions of § 11, and in those quoted from §§ 16, 17, and 23, which should be read in the same connection, was not to interfere at all with the tribal title to the allotted land unless with the consent of the tribe, manifested either by approval of the Agreement for that purpose submitted, or by tribal action under § 15 of the Act of 1893; that the Curtis Act had for its object the administration of the trusts imposed upon the several tribes by the early treaties, and which the tribes had failed to enforce, namely, that the beneficial use of the tribal domain should be enjoyed equally by all the members of the tribe, and that monopolization of it in any form or by any means should be prevented. Section 15, providing for the sale of town lots, improved or unimproved, went somewhat further, and permitted the purchaser to deposit the purchase price in the United States Treasury by way of tender to the tribe. A clause was included—permissive, but probably not obligatory upon the tribe—that “the person authorized by the tribe or tribes may execute or deliver to any such purchaser, without expense to him, a deed conveying to him the title to such lands or town lots; and thereafter the purchase money shall become the property of the tribe,” etc. This plan recognized the fact, referred to in the 1st Report of the Dawes Commission, that towns had been built up with the consent of the tribes, and valuable dwellings and other improvements constructed, without title and without means of acquiring title to the land. With the town lot question we have no present concern, except as § 15, by contrast, throws light upon § 11 and the

other compulsory provisions of the Act respecting allottable lands. Section 11, we repeat, conferred only a personal right to the exclusive use and occupancy of the surface, to be enjoyed by persons identified by the Dawes Commission as properly entitled to a place upon the citizenship rolls.

The argument that this gave to the Creek Indians less than they were already entitled to under their own laws is wide of the mark. We must not be understood as conceding that the Creek laws conferred any inheritable right, except to the improvements upon the land; certainly, no ampler right could be conferred as against the United States, in view of the limitations imposed upon the tribal title by the terms of the patent held by the tribe. But, passing this question, the chief difficulty was not in the Creek laws, but in the mode of their administration or mal-administration. And the manifest purpose of the Curtis Act was not to displace but to recognize the communal titles, and to administer the use of lands for the equal benefit of the members of the tribes according to the true intent and meaning of the early treaties; the effort being to do what the tribal governments ought to have done but were failing to do. That this meaning was placed upon the Act by the Secretary of the Interior will appear from the administrative regulations issued to the Dawes Commission, excerpts from which are set forth in the marginal note, *infra*.

Goat v. United States, 224 U. S. 458, 469, is not in conflict with the view above expressed. That case dealt with the right of Seminole Freedmen to convey the lands allotted to them in severalty pursuant to the agreement confirmed by the Act of July 1, 1898 (c. 542, 30 Stat. 567), and turned upon the question whether the restriction upon alienation imposed by that agreement had been violated. It was argued that the interest of the allottee was not of such a character as to be susceptible of trans-

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fer; and—notwithstanding the provision in the agreement that each allottee should have “the sole right of occupancy of the land so allotted to him”—the court rejected the argument on the ground that the allotments constituted the respective shares of the allottees in the tribal property and were set apart to them as such, and that while the execution of the deeds was deferred, each had meanwhile a complete equitable interest in the land allotted to him. But this was because it was so agreed between the United States and the tribe, and has no bearing upon the proper construction of § 11 of the Curtis Act, which was intended to have effect without consent of the tribe, and was enacted at a time when it was seriously doubted by Congress whether without such consent the tribal title could be divested in favor of an allottee.

In *Welty v. Reed*, 219 Fed. Rep. 864, 867, the Circuit Court of Appeals for the Eighth Circuit, in passing upon another question, expressed the view that a Curtis Act allottee had an inheritable estate or interest. This seems to have been based upon a mistaken view of what was decided in *Goat v. United States*.

From what we have said it results that, when Agnes Hawes, having received an allotment under the Curtis Act, died in June, 1900, without other interest in the land, her interest died with her, and there was nothing upon which the Arkansas law of descent could operate. This would have been so, even had her allotment received the approval of the Secretary of the Interior under § 12 of the Curtis Act. As will presently appear, however, it must be deemed to have been a mere temporary or provisional allotment, not final even for the purposes of the Curtis Act.

We are next to consider the effect upon such an allotment of the subsequent adoption of the Original Creek Agreement (Act of March 1, 1901, c. 676, 31 Stat. 861). But, first, it will be well to briefly review what had been

done in the meantime under the Curtis Act, in order that we may the better understand the situation with which Congress dealt in 1901.

From the 6th Report of the Dawes Commission, p. 9, it appears that while the Atoka Agreement, as proposed by the Curtis Act, was ratified by the Choctaw and Chickasaw Nations at a special election held August 24, 1898, the amended Creek Agreement of September 27, 1897, was not ratified. "Chief Isparhecher of the Creeks was slow to call an election, and it was not until November 1, 1898, that the agreement with that tribe was submitted in its amended form for ratification. While no active interest was manifested, the full-bloods and many of the freedmen were opposed to the agreement and it failed of ratification by about one hundred and fifty votes. As a result the Act of June 28, 1898, known as the Curtis Act, became effective in that nation."

The same report shows (p. 18) that the Commission found it impracticable to establish allotment offices in all five of the tribes pursuant to the departmental regulations of October 7, 1898 (set forth below, in the margin), until a proper system and method of procedure should have been devised, established in one tribe, and demonstrated by experience as satisfactory. "The initiatory work being experimental and requiring the close attention of the Commission, such office was established at Muskogee, in the Creek Nation, where the general office of the Commission is located, thus enabling the Commission to better superintend its operations. Due notice was given by publication, as required by the rules of the secretary, and the office opened for the selection of allotments on April 1, 1899." . . . (Page 20): "Up to and including June 30, 1899, three thousand eight hundred selections were filed on in the Creek Nation."

The 7th Report, p. 31, stated that "Up to and including June 30, 1900, there have been 10,000 selections filed

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in the Creek Nation, amounting approximately to two-thirds of the total number of citizens, and covering the most thickly settled and improved lands of the nation."

These selections were treated as "preliminary," and the allotments as "temporary." The difficulties to be overcome before complete and final allotment were great and unprecedented. (7th Report, p. 12.) For instance, the Creek citizenship rolls had not been completed at the time of the making of the Agnes Hawes allotment, nor were they, indeed, until some time in the year 1902. It is also to be noted that § 11 of the Curtis Act does not authorize allotments of 160 acres or any other specified area, but contemplates a valuation of the allottable lands so as to give to each citizen his fair and equal share in value. Evidently, the Secretary of the Interior and the Dawes Commission realized that to postpone the beginning of allotments until the roll of citizenship of any tribe should be "fully completed as provided by law"—there being disputes without number respecting questions of citizenship, and a mass of litigation arising out of them, as witness *Stephens v. Cherokee Nation*, 174 U. S. 445, 467, which involved 166 appeals from the United States courts in the Indian Territory to this court taken under the Act of July 1, 1898, c. 545, 30 Stat. 571, 591—would have postponed indefinitely the inauguration of the allotment policy in the Indian Territory. The same result would have followed if allotment had been required to await a valuation, lot by lot, of all the allottable lands. But the immediate inauguration of the policy of allotment was urgently called for, not only to break up the system of land monopolies, productive of so much injustice to the individual Indians, but also to educate the Indians in the benefits to be derived from separate occupancy and enjoyment of the land, and thereby to gain popular support for the agreements that

were so earnestly desired as the only permanent relief from an intolerable situation.

There were over 3,000,000 acres of land in the domain of the Creek Nation, and approximately 16,000 Creek Indians and Freedmen. It was easily to be seen that the tribe possessed sufficient allottable land to permit each citizen to take 160 acres, assuming the land values were approximately uniform. There were many reasons of convenience and of sentiment indicating the quarter section as a proper provisional allotment. It ran with the lines of the Government surveys; it was the quantity permitted to be taken up by a citizen of the United States under the preëemption and homestead laws (Rev. Stat., §§ 2259, 2289); it was the quantity proposed to be allotted in the Choctaw-Chickasaw Treaty of 1866, as has been stated; it was the quantity allotted to an Indian, the head of a family, under the general allotment act of 1887 (c. 119, 24 Stat. 388); it was this area that was pointed out as proper to be allotted to an individual citizen of the Five Civilized Tribes by § 15 of the Act of 1893, c. 209, 27 Stat. 645; and, finally, by the amended Creek Agreement of September 27, 1897 (previously rejected by the tribe, but by the Curtis Act required to be resubmitted), 160 acres were to be allotted to each citizen, the residue of allottable lands to be sold in tracts not exceeding that area.

And so it is not surprising that the Secretary of the Interior, in establishing regulations for the selection of allotments under the Curtis Act, included a clause permitting each Creek citizen to take 160 acres. Extracts from these regulations are set forth in the margin.¹ They

¹ EXTRACTS FROM RULES AND REGULATIONS PRESCRIBED BY THE SECRETARY OF THE INTERIOR FOR THE SELECTION AND RENTING OF PROSPECTIVE ALLOTMENTS UNDER THE CURTIS ACT. (Sixth Annual Report of Commission, House Doc. No. 5, 56th Cong., 1st Sess., Vol. 19, p. 81, etc.)

"It is the intention of this law [the Curtis law] to require every member

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contemplated temporary allotments, intended to be approximately equal to what each citizen would get from final allotment.

Meanwhile the Dawes Commission, after the rejection by the Creeks of the agreement submitted pursuant

of any tribe holding in his possession lands in excess of his 'just and reasonable share of the lands of his nation or tribe, and that to which his wife and minor children are entitled,' to relinquish possession thereof in order that other members of the tribe may enter thereon and make homes preparatory to the allotment so contemplated. . . .

"In order, therefore, to give effect to the provisions of said Act according to its design, and to enable every member of each tribe to select and to have set apart to him lands to be allotted to him in amount approximating his share, as aforesaid, the Commission to the Five Civilized Tribes is instructed, as a means preparatory to and in aid of the duty of allotment of the lands of said tribes required of it by said Act, to proceed as early as practicable to establish an office within the territory of each tribe, provided with proper and suitable records, including a copy of the United States survey of the lands of the tribe, for the purpose of registering each and every selection of lands made by any member of the tribe for his allotment; and in order to make such selection of lands by any member of any tribe effective and valid such member, or the head of each family, shall be required to appear in person at the office within his tribe and to make application . . . and thereafter he may occupy, control, and rent the same for any period not exceeding one year, by any one contract, until lands are in fact allotted to him under terms of said Act, and will be protected therein by the government from interference by all other persons whomsoever. . . .

"Selections of land may be made by members of the several tribes in quantities not to exceed 160 acres to each Creek, 80 acres to each Cherokee, 240 acres to each Choctaw and each Chickasaw, and 40 acres to each Choctaw and each Chickasaw Freedman.

"And the balance of the lands belonging to each tribe shall be left unclosed and open for the common use of all members of the tribe until final allotment, and then be divided among them according to the provisions of said Act of Congress and agreement, where agreements have been ratified, so that every member shall have his fair and equal share of all the lands of his tribe.

"After the 1st day of April, 1899, any member of any tribe may enter upon and occupy any lands which have not already been, as .

to § 30 of the Curtis Act, negotiated another agreement with them on February 1, 1899, which, although ratified by the tribe on February 18, was rejected by Congress. 6th Report, pp. 10, 59. Still another agreement was negotiated under date of April 8, 1900 (7th Report, pp. 13, 47), which, with some amendments, was ratified by Congress in behalf of the United States by the act of March 1, 1901 (31 Stat. 861). It was subsequently ratified by the Creek Nation on May 25, 1901 (8th Report, pp. 11, 47; 32 Stat. 1971), and is known as the Original Creek Agreement. It provided for a general allotment of all the tribal lands, except town sites, etc., 160 acres being allotted to each citizen; town lots to be sold; deeds or patents to be made to allottees and purchasers, conveying the tribal title; the residue of lands and all funds arising under the agreement to be used for equalizing allotments; and any deficiency to be supplied out of other funds of the tribe, "so that the allotments of all citizens may be made equal in value, as nearly as may be."

The sections especially bearing upon the present inquiry are §§ 6, 7, and 28.¹ These and the other provisions of the

hereinbefore provided, selected and occupied by another member of the tribe, whether such lands be improved or inclosed or not. . . ."

Promulgated October 7, 1898.

AMENDMENTS TO RULES AND REGULATIONS of October 7, 1898, made April 7, 1899.

"Each Creek citizen may select, in manner provided in said rules, 160 acres of land from the Creek domain, and each Cherokee citizen may so select 80 acres from the Cherokee domain; such selections to be from any lands upon which they now own improvements or from any lands not occupied by or in the possession of any other citizen of the tribe to which the applicant belongs. . . ."

¹ EXTRACTS FROM ORIGINAL CREEK AGREEMENT, Act of March 1, 1901 (c. 676, 31 Stat. 861).

"6. All allotments made to Creek citizens by said Commission prior to the ratification of this agreement, as to which there is no contest,

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Agreement respecting the allotment of lands show that it was the intention of the parties to accept and confirm the allotment work already performed by the Dawes Commission, with the same effect as if it had been done after the ratification of the agreement. This was to adopt what had been done in dividing the lands so far as it had been done consistently with the provisions of the Agreement, and thus save not only the time and expense of the

and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said Commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said Commission.

"7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above. . . .

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation."

* * * * *

"28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one

allotment work, but the great confusion and hardship that would necessarily have resulted if the attempt had been made to vacate upwards of 10,000 allotment selections already made, involving the greater part of the improved lands of the Nation and a large majority of the citizens. At the same time the Curtis Act allotments were brought under the provisions of the Agreement respecting the conveyance of the tribal title, etc. We see no evidence of a purpose to put allotments previously made upon a different basis, in any respect, from allotments thereafter to be made; on the contrary, the phrase used in § 6 is that the confirmed allotments "shall, as to appraisement and all things else, be governed by the provisions of this agreement." We construe the section to mean that allotments theretofore made, if not inconsistent with the provisions of the Agreement, were to be treated the same as if made after the ratification of the Agreement; and this includes the designation of the beneficiaries in case of the death of an allottee.

There were reasons for an express ratification of the allotment work previously done by the Commission. As already pointed out, the allotments had been tentatively and provisionally made in tracts of 160 acres, upon the order of the Secretary of the Interior, and without express authorization of acreage allotments in the Curtis Act; they had been made before completion of the membership rolls and without appraisement of the lands; and, of course, they had been made without the consent of the tribe.

of the [Curtis Act] . . . shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly. . . ."

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But it is argued by plaintiffs in error that there is no provision of the Agreement that can be construed to apply the Creek law of descent to Curtis Act allotments; that § 28 provides for an allotment to the heirs according to Creek law in two cases only, (a) where a citizen living on April 1, 1899, died *prior* to the ratification of the agreement "*before* receiving his allotment of lands and distributive share," etc.; and (b) where the citizen living April 1, 1899, died *after* the ratification of the agreement "*before* receiving his allotment," etc. It is insisted that Agnes Hawes did not fall within either of these classes, since she died *before* the ratification of the agreement but *after* receiving her allotment. It is also insisted that § 7 put in force the Creek law of descent only with respect to the homestead 40 acres; and since the Curtis Act had no provision for homesteads the allotment, when made, was not impressed with homestead characteristics, and no part of the land allotted to heirs was impressed with such characteristics by the Agreement. The result of this argument, if sound, would be that all Curtis Act allotments (over 10,000 in number, and covering more than 1,600,000 acres; 8th report, p. 32), and all allotments made after the ratification of the Original Agreement except homestead allotments under § 7 and a limited class of allotments under § 28, would descend according to the Arkansas laws of descent, while the exceptional allotments, comparatively of little importance, would descend according to the Creek laws.

Even if this construction accorded with the strict letter of the Agreement, it savors too much of refinement to be accepted as an exposition of the true intent and meaning of an engagement made between the Government of the United States and an Indian tribe. *Jones v. Meehan*, 175 U. S. 1, 10; *Choate v. Trapp*, 224 U. S. 665, 675. The adoption of the Creek laws of descent was a concession to the Indians, who were of course more familiar with their

own laws than with Chapter 49 of Mansfield's Digest, and were no doubt materially influenced in giving consent to the treaty by the fact that thereafter their lands would descend just as their personal property had descended in former times. To confine the operation of the Creek laws to the few and exceptional cases, and leave the Arkansas laws in effect respecting the greater part of the tribal domain, would be to keep the word of promise to the ear, while breaking it to the hope. At the same time, it would be inconsistent with the purpose expressed in § 6 to put Curtis Act allotments on a parity with allotments afterwards made. The confusion that would result from applying two variant systems of law at one and the same time, with respect to lands lying side by side and otherwise indistinguishable, is of course apparent. The suggested construction must be rejected.

In our opinion the equitable title to the Agnes Hawes allotment was vested in her heirs according to Creek law by the clear meaning of § 28, which says: "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled . . . shall be placed upon the rolls . . . and if any such citizen has died since that time . . . before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled if living shall descend," etc. Although she had been placed in possession of an allotment, she had not in her lifetime "received" it, in the sense of the Agreement, for this contemplated ownership in fee, and she had received only a provisional surface right. Besides, while § 6 in confirming the allotment brought it under those provisions of the Agreement that contemplated a patent in fee, it was still only a partial dividend out of the property of the tribe. There remained something else contemplated by the Agreement and not received by Agnes Hawes in her lifetime, namely, her "distributive share of

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all the funds of the tribe." Thus we have the precise situation contemplated by § 28, which in that case confers the lands and money, to which she would have been entitled if living, upon her heirs according to Creek law. This accords with the view adopted by the Oklahoma Supreme Court in *Barnett v. Way*, 29 Oklahoma, 780, 785. And see *Washington v. Miller*, 235 U. S. 422, 425.

Were there doubt of the correctness of this view, and were § 28 as restricted in its effect as is contended by plaintiff in error, the same result would follow from a fairly liberal reading of § 7, such as would have to be adopted in construing an agreement with Indians. That section begins by saying that "Lands allotted to citizens hereunder" shall not be encumbered or sold to secure or satisfy any debt contracted prior to the date of the deed to the allottee, and shall not be alienable within five years from the ratification of the agreement except with the approval of the Secretary of the Interior. Then follow clauses imposing restrictions solely upon the homestead 40 acres, and the section ends by declaring that the homestead shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of the Agreement, but in the absence of such issue "he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, *the land shall descend* to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation." It is reasonable to suppose that the Indians, when giving approval to this agreement, would understand that the land which was thus to descend free from limitation included as well the land to which the limitation had never applied as that to which it had applied, but respecting which it had expired. And they would understand the provisions of § 28 (if limited as is here contended) to apply the laws of descent and distribution of the Creek Nation to allotments made under the peculiar circum-

stances there provided for, in order to bring those allotments into conformity, as to descent and otherwise, with allotments of the general class, including allotments made prior to the ratification of the agreement, which by § 6 were "as to appraisement and all things else" to be governed by the provisions of the agreement. Such was the view expressed by the Supreme Court of Oklahoma in *de Graffenried v. Iowa Land & Trust Co.* (1907), 20 Oklahoma, 687, 709-711. In *Bartlett v. Okla. Oil Co.*, 218 Fed. Rep. 380, 385, the United States District Court for the Eastern District of Oklahoma passed upon the question of the descent of a Creek allotment held by a full-blood Indian of that tribe who died November 17, 1907, one day after the admission of Oklahoma as a State. It being in dispute whether the Creek law, the Arkansas law, or the Oklahoma law of descent and distribution applied, the court, in the course of a historical review of the legislation of Congress, said (p. 385) that under the Original Creek Agreement the descent of surplus lands was not especially provided for, and therefore was controlled by the laws of Arkansas, in force in the Indian Territory by virtue of the Act of June 7, 1897, and June 28, 1898 (the Curtis Act); but this was clearly *obiter*.

Under either of the views that we have expressed, the Agnes Hawes allotment, if it was uncontested, if it did not include public property, and was not otherwise affected by the Original Creek Agreement, was confirmed by § 6. That it was not among the excepted classes is sufficiently evidenced by the subsequent action of the Dawes Commission in awarding it to the heirs of Agnes. That which had been tentative and provisional, then became by force of the provisions of the Agreement, final and conclusive. The result was to vest a complete equitable title in her "heirs," to be determined according to the Creek laws of descent and distribution; and, upon familiar principles, their interest, being vested, was not divested by the sub-

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sequent adoption of the Act of May 27, 1902, c. 888, effective July 1, 1902 (32 Stat. 258; Joint Res. No. 24, 32 Stat. 742), or the Supplemental Creek Agreement (Act of June 30, 1902, c. 1323, § 6, 32 Stat. 500, 501; effective August 8, 1902, 32 Stat. 2021), which substituted the Arkansas laws. (See *Ballinger v. Frost*, 216 U. S. 240, 249.) *Sizemore v. Brady*, 235 U. S. 441, 448, is distinguishable, because there the allotment in question was not selected or made until after the Supplemental Agreement went into effect.

It is undisputed that according to Creek law the husband was entitled to take a half interest in his wife's property if she died without will, at least in case there were no children. And it is now settled that an intermarried non-citizen husband could inherit under the tribal laws the same as if he were a citizen. *Reynolds v. Fewell*, 236 U. S. 58, 63; *Shellenbarger v. Fewell*, 236 U. S. 68.

It is perhaps unnecessary to say that the subsequent issue of a patent to the "Heirs of Agnes Hawes," without naming them, conveyed the legal title to those persons upon whom the equitable title was conferred by the Original Agreement.

The restrictions upon alienation contained in the Original Agreement did not apply to allotments made on behalf of deceased members of the tribe. *Skelton v. Dill*, 235 U. S. 206, 210. Indeed, all restrictions upon alienation as to allottees not of Indian blood (except minors and except as to homesteads) were removed by the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 204).

Therefore, the conveyance on June 22, 1904, by Ratus Hawes to defendant in error passed to the latter the undivided half interest in the lands in question.

The further point is raised that defendant in error (plaintiff below) was barred from maintaining his present action by a decree dismissing a previous suit, brought by him prior to Statehood in the United States Court for

the Western District of the Indian Territory, against Louis and Peggie Woodward, for a partition of the same land. This contention—equivalent to the plea of *res adjudicata*—was rejected by the state court upon the ground that the partition suit was brought in equity, and was dismissed because the petition showed that the land was held by the defendants adversely to plaintiff, and because he could not maintain an action for partition in equity without first establishing his title by an action in ejectment. The decision was rested upon the authority of numerous cases cited from the Supreme Court of Arkansas—the practice of that State having been put in force in the Indian Territory by act of Congress. We concur in the result, and need add nothing to the reasoning of the state court.

One or two other questions were argued, but they are not within the assignments of error—indeed, were not raised in the court whose judgment is under review.

Judgment affirmed.
